EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
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DIFFERENCES AND SIMILARITIES BETWEEN ARGUMENTS ON THE DIRECT EFFECT OF INTERNAL AND EXTERNAL COMMUNITY LEGAL ACTS

(Master Thesis)

Supervisor: **Professor Antonio CASSESE**

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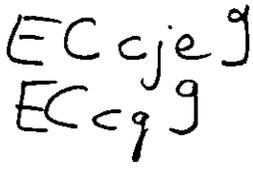
Research student

FLORENCE, *February 1995*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1. INTRODUCTION

The theory of the direct effect of Community law provisions is probably one of the most important contributions of the Court of Justice of the European Communities[1] to the unique character of the legal system of the Community and more general to the integration process. This theory, with its specific and extended implementation within the Community context, represents one of the main characteristics which led to the definition of the Community as a supranational organisation. Thus, it does not seem exaggerated that Schermers's conclusion that directly effective provisions are "the most important remnant of the supranational ideals of the Community's founding fathers"[2].

Whereas the expression "direct applicability" was mentioned in Article 189 of the EEC Treaty referring only to Community regulations, the direct effect of Community acts was later established in its entirety by the creativity of the ECJ, and has become a cornerstone of the legal system of the Community. This concept has enabled the European Community institutions to enact various legislation that "give rise to rights in favour of individuals, which national courts are bound to safeguard"[3]. In its case-law, the ECJ has declared the founding treaties,

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[1] Hereinafter referred as the ECJ or the European Court. Also, expression "Community" will be referred to both to the EEC and other two European Communities.

[2] Schermers, *Judicial Protection in the European Communities* (Kluwer, 1976), p. 176.

[3] Case 120/73, *Gebr. Lorenz GmbH v. The Federal Republic of Germany and the Land Rheinland/Pfalz*,[1973] ECR, p. 1471, at 1483, ground 8.

regulations, directives and decisions[4] as capable of containing certain provisions having direct effect and also, although to a lesser extent, of provisions contained in the international agreements of the European Community.

Generally speaking, the direct effect of these legal acts is result of very liberal interpretation of the Community legal system by the Court of Justice. This notion, although already known in international law and thus not an invention of the ECJ, has been developed within the Community to the extent "jusque là inconnu"[5].

The ECJ has explored, at the first instance, the modest possibilities of a preliminary ruling system based on Article 177 of the EEC Treaty[6] to create a consistent and comprehensive system of Community legal order. The basic approach of the Court could be described as a policy-oriented one, namely a teleological and systematic interpretation of the Community provisions aimed at the creation of economic union within the European Community. The ECJ itself considers today the direct effect of the Community law, together with its primacy, as the essential characteristic of the Community based on the rule of

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[4] For the purpose of this master thesis, the expression "the Community law *stricto sensu*" will be referred to the founding treaties, regulations, decisions and directives. Although the international agreements form part of the Community legal system, the expression "the Community law *lato sensu*" will be used for these legal acts, in order to differentiate them from the other Community acts.

[5] P. Pescatore, *L'ordre juridique des Communautés européennes: Etude des sources du droit communautaire* (Liege: Presses universitaires de Liège, 1975), p. 200.

[6] *See* more in Renaud Dehousse, *La Cour de justice des Communautés européennes*, (Paris: Montchrestien, 1994), pp. 32-38;

law[7].

Introduced for the first time in a rather modest way by the *Van Gend & Loos Case*[8] as an exception[9], relying heavily on the international law tradition, by the relevant jurisprudence of the European Court this concept has become a rule rather than an exception in the framework of the Community law *stricto sensu*. After having established the direct effect of Article 12 of the EEC Treaty, the ECJ has ruled in favour of the direct effect of the different types of the Treaty provisions, confirmed and explained the direct effect of regulations and established the direct effect of directives and decisions addressed to the Member States. Today, only few aspects of direct effect of directives, as for example their horizonal direct effect, are still subject to a doctrinal debate.

An importance of the international agreements of the European Community has grown by the time and by the competence accorded to the Community, which all resulted by a significant number of agreements binding to the Community. For those reasons, a question of effects of those agreements in general, and especially to the individuals, has become more important and has been in a basis of the ECJ's case-law. It should be noted,

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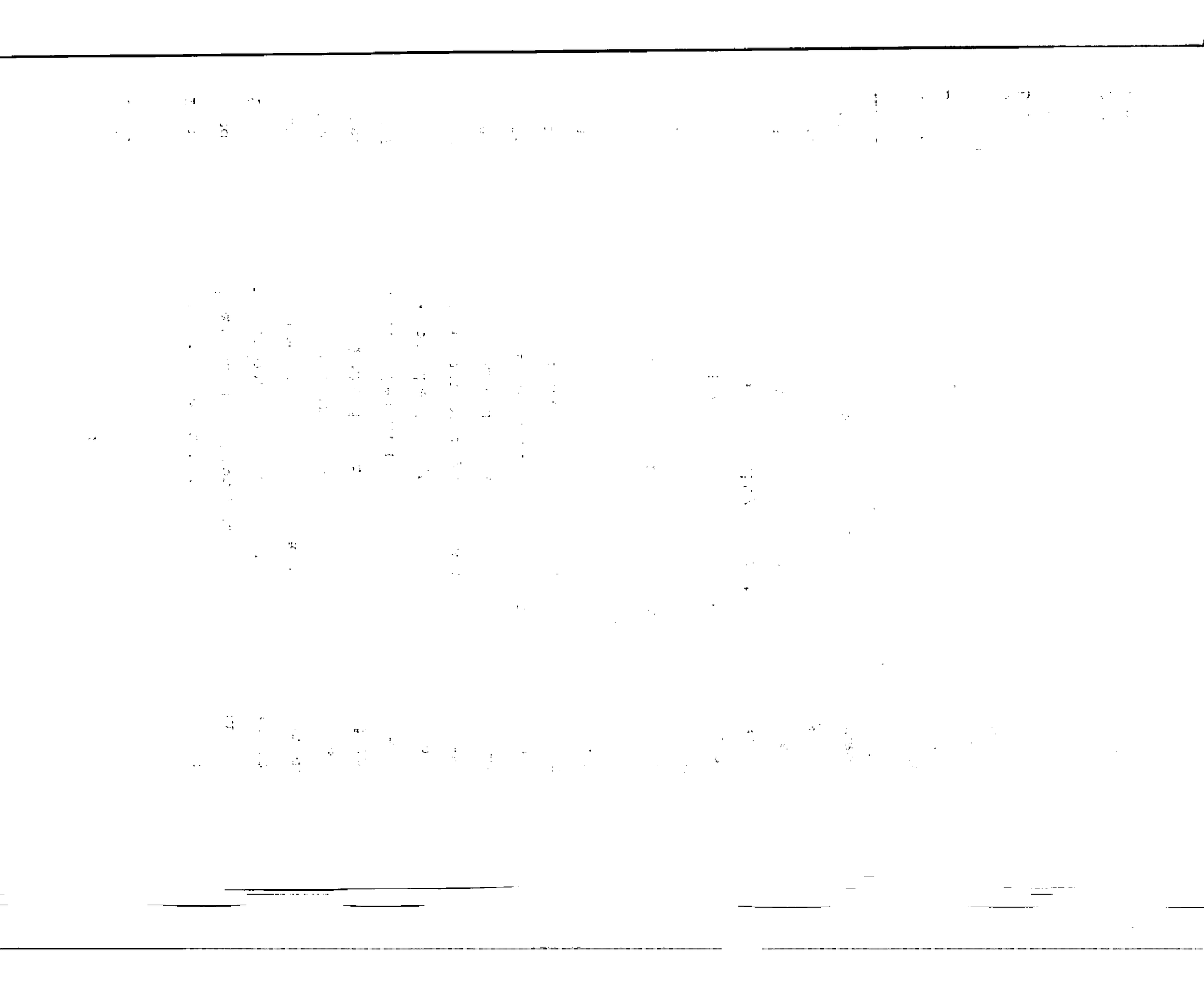
[7] *See Opinion 1/91, Draft Agreement between the Community and the Countries of EFTA relating to Creation of the European Economic Area,* [1991] ECR, p. 6079, at I-6102, para. 11.

[8] Case 26/62, *N.V. Algemene Transport - en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen (Nethelands Inland Revenue Administration),* [1963] ECR, p. 1.

[9] *See* more in T.C. Hartley, *The Foundations of European Community Law,* 2nd edition (Oxford: Clarendon Press, 1988), p. 194.



however, that the direct effect of the Community law *lato sensu* has not had the same treatment as the other binding Community legal acts. The Court has not created a comprehensive and complete system and its case-law still leaves space for further precision on this issue. The crucial question would be, as it was explained by Advocate-General Trabucchi in the *Bresciani Case* "[w]hether a clause of an agreement put into effect under a system of law other than that of the Community, namely general international law, and, as such, subject to rules and circumstances peculiar to itself is capable of having direct effect within the Community's own system, with the same meaning and the same effects as a Community provision."[10]

To answer this question, it may be interesting to analyze the most important arguments given by the Court of Justice regarding the direct effect of the Community provisions *stricto sensu*, and compare them with those arguments presented for the direct effect of the international agreements binding on the European Community. That would be the best method to see all similarities and differences of approach to the direct effect of these two aspects of the Community provisions given by the Court.

The analysis of the present thesis will be based primarily on the case-law of the Court of Justice, beginning with the famous and already mentioned preliminary ruling in the *Van Gend & Loos Case*, and later subsequent cases regarding the direct effect of the Community law *stricto sensu*, which will then be compared with the

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[10] Case 87/75, *Conceria Daniele Bresciani v. Amministrazione Italian delle Finanze*, [1976] p. 129, at p. 148.

International Fruit Company Case[11] and other cases involving issues of the direct effect of international agreements. While there is a lot of literature and a significant jurisprudence of the Court on the direct effect of the primary and secondary Community legislation, or as it was pointed out by Bebr "the case-law of the Court on direct effect of Community rules reveals a fairly straightforward, almost organic growth"[12], the direct effect of international agreements did not attract such attention of the doctrine nor of the Court. It should not be expected to find in this paper a complete list of the ECJ's judgments and opinions in order to explain its position, but rather a survey of existing solutions by the method of deduction.

By using a comparative method, the present thesis will try to reach some conclusions about different approach of the ECJ to these two aspects of the direct effect of Community law. A critical analysis of Court's opinion could be interesting for further development of this concept.

Before coming to the main subject of this thesis, some methodological remarks are necessary. For the purpose of this study, it will be considered that the terms "direct effect" and "direct applicability" do not have necessarily the same meaning. Without going into more detail in the doctrinal controversy on possible substantive difference regarding these two

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[11] Joined Cases 21 to 24/72, *International Fruit Company NV, Kooy Rotterdam NV, Velleman en Tas NV and Jan Van den Brink's Im- en Exporthandel NV v. Produktschap voor Groenten en Fruit*, [1972] ECR, p. 1219.

[12] G. Bebr, "Agreements Concluded by the Community and Their Possible Direct Effect: From International Fruit Company to Kupferberg", 20 *CMLr* (1983), pp. 35-73, at 37.

expressions[13], due to the limited scope of this thesis, only general statements will be presented in this introduction, in order to enable an analyses of the main subject.

The European Court itself has contributed to the controversy about the terminology by using several terms without clear explanation of possible differences in their substance[14]. Although the question whether all expressions used by the ECJ could be considered as synonyms or have different meanings is too complex to be analyzed here, in some judgments the ECJ gave indications of possible different meaning, or at lest of the existence of two aspects of the same issue. The final aim of the creation of individual rights by a Community act which could be relied upon before national courts could have two aspects. First one is a way of becoming integral part of a national legal order, and thus applicable by the national tribunals, and other one is the specific effect of Community provision on the individuals, which is subject to certain requirements formulated by the ECJ. While in most of the cases, these two elements have to be present together for direct effect, it can be argued that it has not

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[13] *See* for different positions: D.A.C. Freestone and J.S. Davidson, *The Institutional Framework of the European Communities*, (London&New York: Croom Helm, 1988), pp. 28-29; Steiner, "Direct Applicability in EEC Law: A Chamelon Concept", 98 *LQR* (1982), p. 229; Hartley, *op. cit. supra* note 9, p. 196; Alan Dashwood, "The Principle of Direct Effect in European Community Law", XVI *Journal of Common Market Studies* 3 (1978), pp. 229-245, at 230-231; J.A. Winter, "Direct Applicability and Direct Effect - Two Distinct and Different Concepts in Community Law", *9 CMLr* (1972), pp. 425-438.

See in particular discussion on this subject by the Advocate General Tesauro in the *Yousfi Case*, Case C-58/93, *Roubir Yousfi v. Belgian State*, ECR [1994], p. I-1353, at I-1357-1359.

[14] For example, "direct applicability", "direct effect" or "immediate effects".

always been the case[15]. For example, it is doubtful whether the Community directives, as such, become a part of national legal system, but the ECJ ruled, in more than one occasion, that provisions contained in those acts, could produce direct effect.

Consequently, "direct applicability" may be considered more as a method in which the Community provisions become an integral part of internal legal system. As the ECJ described in the *Simmenthal Case*, "direct applicability ... means that rules of Community law must be fully and uniformly applied in all Member States from the date of their entry into force and for so long as they continue in force"[16]. The second aspect of this phenomenon presented in the same Case by the ECJ is closer to our understanding of "direct effect". The ECJ says that "[t]hose provisions are therefore a direct source of rights and duties for all those affected thereby, whether Member States or individuals, who are parties to legal relationships under Community law"[17]. All this could implicitly mean that not all provisions directly applicable are capable of creating individual rights (as for example Article 177 of the EEC Treaty), although the direct

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[15] For a different opinion, only to refer to a recent article by Ilona Cheyne, "International Agreements and the European Community Legal System", *ELR* (1990, p. 581-598, at 585: "Within the context of Community law, it is possible to say that the terms direct applicability and direct effect have essentially the same meaning... [T]here cannot be direct effect without also being direct applicability".

[16] The *Simmenthal Case*, Case 106/77, *Amministrazione dello Stato v. Simmenthal S.p.A.*, [1978] ECR, p. 629, at 643, ground 14. Later, in the *Amsterdam Bulb Case*, the ECJ defined that "the direct application of a Community regulation means that its entry into force and its application ... are independent of any measure of reception into national law", Case 50/76, *Amsterdam Bulb v. Produktschap voor Siergewassen*, [1977] ECR, 137, at 146.

[17] The *Simmenthal Case*, *op. cit.*, note 16, ground 15.

applicability of a Community provision in most cases represents a ground for its effects on the rights of individuals. As a consequence, the expression "direct effect" will be used in the present thesis basically to mean the creation of the direct rights of individuals which national courts must protect.

A second remark that may be useful to make at the very beginning is on the close relationship of the direct effect theory with the notion of the supremacy (or the primacy) of Community provisions over the national legal norms. In the *Costa Case* the ECJ established the principle that "the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, ..."[18]. In the *Simmenthal Case*, the ECJ explained that "every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent"[19]. The supremacy of Community law could be described as a "corollary"[20] of the direct effect theory. One of the purposes of supremacy of the Community law over the national legal acts is to ensure the effectiveness of the direct effect concept. As Bebr pointed out, "[t]he concept of a provision directly effective has always been

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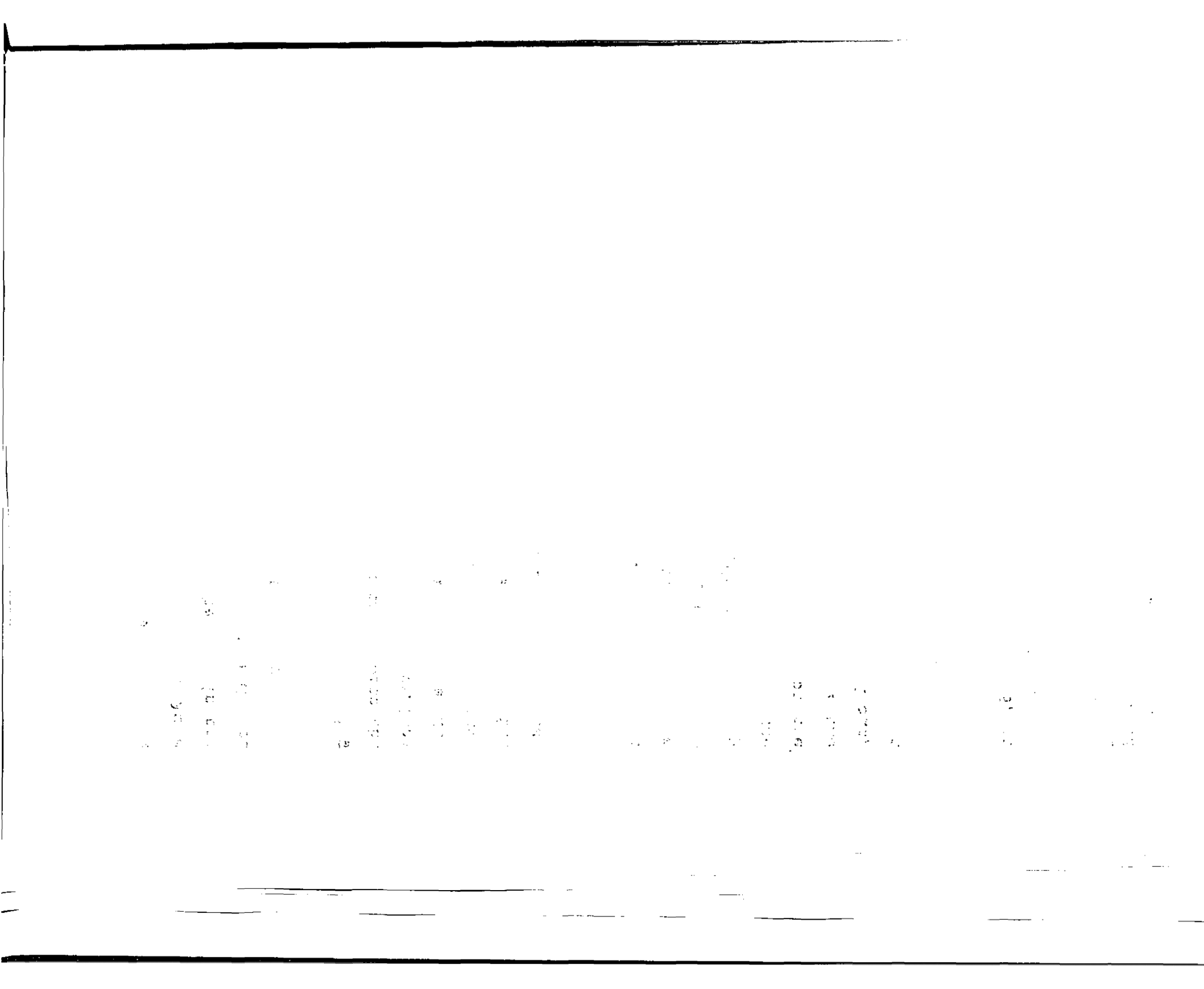
[18] Case 6/64, *Flaminio Costa v. ENEL*, [1964] ECR, p. 585, at 594.

[19] The *Simmenthal Case*, op. cit., at 644.

[20] Jacques H.J. Bourgeois, "Effects of International Agreements in European Community Law: Are the Dice Cast?", 82 *Michigan Law Review* Nos. 5&6 (1984), pp. 1250-1273, at 1262.



functionally related to the supremacy of Community law"[21]. These two principles have been considered as the "twin constitutional principles"[22].

2. THE ECJ'S COMPETENCE TO INTERPRET:

2.1. THE COMMUNITY LAW *STRICTO SENSU*

The European Court of Justice has almost an exclusive role in the interpretation of Community law. The competence of the European Court was established by Articles 164 and 219 of the EEC Treaty. Furthermore, Article 177 of the EEC Treaty gives to the European Court a possibility to interpret the Treaty in a form of the preliminary ruling. Therefore, such the competence does not depend on any further agreement of the contracting parties (Member States of the European Communities), but is based on the Treaty itself. The same competence is extended automatically to all Community secondary legislation. In the *Variola Case*, opposing itself to all internal measures that would simply reproduce a text of an regulation, the Court ruled that "*Member States are under an obligation not to introduce any measure which might affect the jurisdiction of the Court to pronounce on any question involving the interpretation of Community law or the validity of an act of the institution of the Community, which means that no procedure is permissible whereby the Community*

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[21] G. Bebr, *Development of Judicial Control of the European Communities*, (Martinus Nijhoff, 1981), p. 555.

[22] Deidre Curtin, "The Decentralized Enforcement of Community Law Rights, Judicial Snakes and Ladders", in *Constitutional Adjunction in European Community and National Law*, pp. 33-49, at 35.

nature of a legal rule is concealed from those subject to it"[23]. The main argument of such a competence of the ECJ has been uniform application of the Community provisions. The logic of role of the ECJ in the European integration process is explained by Judge Lecourt: "*Le Marché Commun ne puvait être conçu que comme un état de droit. Il devail reposer sur la prévalence d'une règle commune contraignante, directement applicable et juridictionnellement sanctionnée par le juge chargé d'en préserver l'unité. Sans ces garanties il n'était par de Marché Commun concevable*"[24].

There are two important elements in the European Court's approach to the question of its competence which influenced the direct effect concept. First, the Court declared that the direct effect is essentially the notion of the Community law and not of the national legal systems of Member States. In the *Van Gend & Loos Case*, in which the ECJ established the basis of its theory of direct effect, all remarks of the three governments that the European Court has no jurisdiction to give a preliminary ruling as the Dutch constitutional law is to determine the effects of the EEC Treaty within national legal order, as well as a serious analysis of the Advocate-General Roamer regarding the relevant constitutional law of the Member States[25], were rejected by the Court indicating that the effects of the Community law cannot be determined by the internal legal system but by the Community law.

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[23] Case 34/73, *F.lli Variola SpA v. Amministrazione italiana delle Finanze*, [1973]ECR, p. 981, at 991. ground 11.

[24] Robert Lecourt, "La rôle unificatuer du juge dans la communauté", in: *Etudes de droit des Communautés européennes, Mélanges offerts à Pierre-Henri Teitgen*, (Paris: Paten, 1984), p. 223, at 225.

[25] *Op. cit.*, p. 23.

This position enabled the European Court, as the interpreter of the Treaties, to establish the direct effect principle as a result of judicial creativeness, even above the intentions of the Member States.

The second important element is the fact that a national tribunal is the only organ before which the rights of individuals can be effectively enforced and that the Court's interpretation of the Treaty is binding for those tribunals, which gives a full impact to the concept of the direct effect and makes it real for the individuals. The direct effect concept is therefore a combination of legal norms having different origin. The Community law is to provide legal provisions having characteristics which make them capable of creating the individual rights. But, the Member States and particularly their judicial systems, are those who should create the necessary conditions that the direct effect of Community provisions could be effectively implemented. They should create a procedural ground for this purpose. As it was explained by the European Court in several occasions, for example in the *Lorenz Case*, "it is for internal legal system of every Member State to determine the legal procedure leading to this result"[26]. This obligation was reinforced in the *Johnston Case* by a position that the Member States "must take measures which are sufficiently effective to achieve the aim of directive and that they must ensure that the rights thus conferred may be effectively relied upon before the national courts by the persons concerned"[27].

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[26] Op. cit., p. 1483, ground 9.

[27] Case 222/84, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, [1986] ECR, p. 1651, at 1682, ground 17.

It should be however noted that this double aspect of the competence regarding the direct effect has left some space for the national jurisdictions to contest the role of the Court as the exclusive interpreter of the Community legislation. The ECJ has established the basic principles of direct effect theory and has formulated requirements for its concrete application on the specific provision, but its action depends on the request for the preliminary ruling submitted by the national tribunal. In this regard, especially in the case of the direct effect of Community directives, some national tribunals have contested the exclusive interpretative role of the ECJ, or even opposed themselves directly to the interpretation given by the European Court. In Belgium, *la Cour de cassation*[28] et *le Conseil d'Etat*[29] have ruled on several occasions on the direct effect of the Community provisions, without having asked the ECJ's preliminary ruling. In the same manner, the Italian Constitutional Court's practice shows that this institution considers that it has a right to rule on the direct effect of Community provisions. For example, in its Decision No. 168 de 1991, the Italian Court stated that it shared a competence with the ECJ and the ordinary judge to decide whether one directive could produce the direct effect. The most famous example of the clear opposition of national tribunal to the ECJ interpretation is the case of *Ministre de l'intérieur contre Cohn Bendit*[30] of 22 December 1978 in which French *Conseil d'Etat*, giving its own interpretation of Article 189, ruled against the possibility that a provision contained in a directive

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[28] Judgment of 8 june 1967, C.D.E. (1969), p. 436.

[29] Case *No. 13-146, Corveleyn*, judgment of 7 October 1968, C.D.E., (1969), p. 343.

[30] Dalloz, Receuil, 1979, p. 155.

could have direct effect, whatever was its character[31]. This opinion was directly opposite to the earlier view of the ECJ presented in the *Rutili Case*.

There is another aspect from which the competence of the ECJ could be contested, having in mind both further institutional improvement (development) of the primary legislation and the ECJ's method of interpretation. For example, the German Federal Constitutional Court (*Bundesverfassungsgericht*), in its recent ruling of 12 October 1993[32] on interpretation of the 28 December Law on adoption of European Union Treaty ("Maastricht Treaty" of 7 February 1992), sent a clear message to the ECJ concerning limits of its competence and its method of interpretation. After having concluded that "*on se trouve dès lors en présence d'une violation de l'article 38 GG lorsqu'une loi qui ouvre l'ordre juridique allemand à l'application directe du droit des Communautés européennes - organisation supranationale - ne fixe pas de façon suffisamment précise les droits dont l'exercice est transféré et le programme d'intégration prévu*", The German Court

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[31] "*quelles que soient d'ailleurs les précisions qu'elles contiennent à l'intention des Etats membres, les directives ne sauraient être invoquées par les ressortissants de ces Etats à l'appui d'un recours dirigé contre un acte administratif individuel*". *See* also cases referred to by P. Manin, *Les institutions européennes, L'Union européenne, Droit institutionel* (Paris, 1993), p. 252.

[32] No. 2 BVR 2134/92 et 2 BvR 2159/92. For comments on this opinion, *see*, e.g., H. Gerald Crossland, "Three major decisions given by the Bundesverfassungsgercht (Federal Constitutional Court)", *European Law Review*, April 1994, pp. 202-214; Hugo Hann, "La Cour constitutionnelle fédérale d'Allemagne et le Traité de Maastricht", *RGDIP* (1994), pp. 107-126; Dominik Hanf, "Le jugement de la Cour constutionnelle fédérale allemande sur la constituionnalité du Traité de Maastricht. Un nouveau chapitre des relations entre le droit communautaire et le droit national", *RTDE*, No. 3 (1994), pp. 391-423.

ruled that

> *"si, par exemple, des institutions ou organes européens pratiquaient ou faisaient évoluer le traité d'Union d'une façon qui ne serait plus couverte par le traité tel qu'il a servi de base à la loi d'approbation allemande, les actes qui en découleraient ne seraient pas obligatoires sur le territoire allemand",*

and defined its own competence for the future by saying that

> *"c'est pourquoi il appartient ou Bundesverfassungsgericht de vérifier si les actes des institutions et organes européens se situent dans les limites des droits de souveraineté qui leur sont conférés ou s'ils les excédent".*

At the same time, the German Court limited the method of interpretation, if not the competence of the ECJ, by concluding that

> *"si une extension dynamique des traités existants s'est fondée jusqu'à présent sur une pratique libérale de l'article 235 du traité CEE dans le sens d'une 'compétence de parachèvement des traités', sur l'idée des compétences intrinsèques des Communautés européennes ("implied powers") et sur une interprétation des traités dans le sens de l'utilisation la plus large possible des compétences communautaires ("effet utile"), il y aura lieu à l'avenir, lors de l'interprétation de normes de compétence par des organes et institutions des Communautés, de tenir compte du fait que le traité d'Union distingue en principe entre l'exercice d'une compétence relevant de la souveraineté octroyée moyennant des limites, d'une part, et la révision du traité, d'autre part; l'interprétation de celui-ci ne saurait donc aboutir à un résultat équivalant à son extension; une pareille interprétation de normes de compétence n'aurait pas de caractère obligatoire pour l'Allemagne".*

The relationship between the national tribunals and the ECJ on the competence issue cannot be determined in a definitive

manner. A possible solution could be found in the analogy to the arguments presented in the *Foto-Frost Case* regarding jurisdiction to declare the Community measure as invalid. While the possibility of requesting a preliminary ruling is an option for the national courts (with the exception of the third paragraph of Article 177), the principle of uniform application of Community law by national courts gives an advantage to the European Court.[33] It is explained in this Case that the necessary coherence of the system of judicial protection established by the Treaty should be always considered[34].

2.2. THE INTERNATIONAL AGREEMENTS

The ECJ has, pursuant to Article 228 (1) of the EEC Treaty, competence to give its opinion as to whether an agreement envisaged by the Commission and the Council is compatible with the provision of the EEC Treaty, and such an opinion has an influence on the entry into force of the agreement which was declared as incompatible with the Treaty by the ECJ[35]. With regard to the international agreements already binding on or concluded by the European Community and their possible direct effect, the ECJ finds itself in a different role. The European Court cannot be the exclusive interpreter of the agreements' provisions, but interprets the effects of such agreements only on behalf of one contracting party.

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[33] *See* arguments in Case 314/85, *Foto-Frost, Ammersbek v. Haumtzollamt Lübeck-Ost*, [1987] ECR, p. 4199, at 4231, point 15.

[34] The *Foto-Frost Case, ibid*, p. 4231, ground 16.

[35] A recent example of such a competence is the *Opinion 1/91, op. cit.*

Aware of this fact, the European Court has formulated several limits and conditions for its competence. First, it has emphasized that it will decide on the direct effect of the agreement within Community legal order only if the contracting parties have not settled this question in the agreement themselves[36]. In the *Kupferberg Case*, the ECJ explained that "only if that question [parties' decision on what effect the provisions of the agreement will have in the internal legal order of the contracting parties] has not been settled by the agreement does it fall for decision by the courts having jurisdiction in the matter, and in particular by the Court of Justice within the framework of its jurisdiction under the Treaty, in the same manner as any question of interpretation relating to the application of the agreement in the Community"[37]. It is confirmation that in the interpretation of international agreements, the intention of the contracting parties should be first taken into account, in accordance with the classical approach of the international law. The ECJ made clear in the *Kupferberg Case* that "in conformity with the principles of public international law Community institutions which have power to negotiate and conclude an international agreement with a non-member country are free to agree with that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties"[38]. In fact, an agreement could establish its own system of settlement of disputes, including its

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[36] Some authors distinguish two hypotesis, *see*, e.g., Luc Imbrechts, "Les effets internes des accords internationaux des Communautés européennes, 10 *Revue d'inégration européenne/Journal of European Integration* 1, (1986), pp. 59-77, at 67.

[37] Case 104/81, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie. KG a.A.*, [1982] ECR, p. 3641, at 3663, ground 17.

[38] The *Kupferberg Case, op. cit.*, p. 3663, ground 17.

own court, and decisions of such a court would be binding on the ECJ pursuant to Article 228 of the EEC Treaty. The ECJ, in the *Opinion 1/91*, regarding question of compatibility of the draft agreement relating to the creation of the European Economic Area (EEA) with the EEC Treaty[39], was explicit by saying that

> "[w]here, however, an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement, and as a result, to interpret its provisions, the decisions of that court will be binding on the Community institutions, including the Court of Justice. Those decisions will also be binding in the event that the Court of Justice is called upon to rule, by way of preliminary ruling or in a direct action, on the interpretation of the international agreement, in so far that agreement is an integral part of the Community legal order"[40].

There is also a possibility, as it is a case of EEA Agreement, that the agreement, establishing the new EEA Court, provides that this organ is under duty to interpret the provisions of the agreement in the light of the relevant rulings of the ECJ given prior to the date of signature of the agreement and that it has the organic links with the ECJ, i.e., providing that judges from the European Court of Justice are to sit on the EEA Court[41].

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[39] Request of the Commission pursuant to second paragraph of Article 228(1) of the EEC Treaty. The ECJ dealt with the same issues in *Opinion 1/92* of 10 April 1992, [1992] ECR, p. I-2821.

[40] *Opinion 1/91*, *op. cit.*, p. I-6106, ground 38.

[41] The ECJ itself made some reservations and explained that differences exist. The reservations concern incertitude with regard to the question whether case-law of the ECJ prior to the date of signature of the agreement is to be applied and whether this case-law refers also to the direct effect and primacy of Community law. As for the judges, the ECJ explains that the same persons sitting in the different courts will have to apply and interpret the same provisions but using different approaches, methods and concepts in order to take account of the nature of

In a situation where the agreement does not establish any organ which would interpret it or the ECJ does not make reference to such a body[42], the ECJ has found again Article 177 as a basis of its competence, at least as regards the direct effect problem. The ECJ explained in the *International Fruit Company Case* that "[u]nder that formulation [of Article 177], the jurisdiction of the Court cannot be limited by the ground on which the validity of those measures may be contested", more precisely, "such jurisdiction extends to all grounds capable of invaliding those measures, [and] the Court is obliged to examine whether validity may be affected by reason of the fact that they are contrary to a rule of international law".[43] It should be noted however that this Case was rather peculiar and the preliminary ruling was given on the specific circumstances, which has determined most of the ECJ's considerations in the later cases on the same problem. The Netherlands tribunal (*College van Beroep*), asked the ECJ whether two Community regulations were contrary to the provisions of the General Agreement on Tariffs and Trade (GATT). First of all, the request for preliminary ruling was a reason for the ECJ to refer Article 177 in the context of the examination of the validity of one Community act. Second specific circumstance was that the national court requested the

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each treaty and of its particular objectives; The *Opinion 1/91*, *op. cit.*, grounds 16, 27 and 51.

[42] As for example the Yaoundé Convention of 1963 which provides for establishment of an Arbitration Court of Association for settling disputes between the Community and an Associated State, competent to interpret and to control the application the Convention and whose decisions are binding on the parties. The ECJ, dealing with the question of direct effect of the Convention in the *Bresciani Case*, *op. cit.*, made no reservation about its competence as in the case quoted above.

[43] The *International Fruit Company Case*, *op. cit.*, at 1226, grounds 5 and 6.

interpretation of GATT, the agreement which had been concluded by the EEC Member States before the signature of EEC Treaty, and never formally concluded by the Community. For this reason, in absence of the formal act of the Community institutions, the ECJ had to stress that "the Community must first of all be bound by this provision [of international law]"[44]. After having stated that the GATT was binding on the Community[45], the ECJ concluded in the *Nederlandse Spoorwegen Case* that "[s]ince so far as fulfilment of the commitments provided for by GATT is concerned, the Community has replaced the Member States, the mandatory effect, in law, of those commitments must be determined by reference to the relevant provisions in the Community legal system and not to those which gave them their previous force under the national legal systems"[46]. As a consequence, "the Community authorities alone have jurisdiction to interpret and determine the legal effects" of such an international

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[44] The *International Fruit Company Case, ibid*, p. 1226, ground 7; The *Schlüter Case, Carl Schlüter v. Mauptzollamt Lörrach*, [1973] ECR, p. 1135, at 1157, ground 27.

[45] The ECJ had to analyze whether GATT was binding for the Community. It dealt in more details with this issue in the *International Fruit Company Case, ibid*, pp. 1226-1227, grounds 10-18. In the Joined cases 290 and 291/81, *Compagnia Singer SpA and Geigy SpA v. Amministrazione delle Finanze dello Stato*, [1983] ECR, pp. 847, at 861, ground 7, the ECJ confirmed that "the Community has been substituted for the Member States in relation to the fulfilment of the commitments laid down by the General Agreement on Tariffs and Trade with effect from 1 July 1968, the date on which the Common Customs Tariff was brought into force, the provision of that agreement have since that date been amongst those which the Court of Justice has jurisdiction, by virtue of Article 177 of the EEC Treaty, to interpret by way of a preliminary ruling regardless of the purpose of interpretation."

[46] The *Nederlandse Spoorwegen Case*, Case 38/75, *Douaneagent der NV Nederlandse Spoorwegen v. Inspecteur der Invoerrechten en accijnzen*, [1975] ECR, p. 1439, at 1450, ground 16.

obligation[47].

There is another reason for the interpretative role of the ECJ, having in mind the very nature of the Community internal relations. The ECJ stated that "in ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil, within the Community system, an obligation in relation to the Community, which have assumed responsibility for the due performance of the agreement"[48].

In the later cases, having before it a legal act concluding agreement issued by the Community institution, the ECJ simplified its arguments on the competence. In the *Haegeman Case*, the ECJ specified that "the Athens Agreement was concluded by the Council under Articles 228 and 238 of the Treaty..."[49]. Consequently, "it must be pointed out that the agreement is an act of one of the institutions of the Community within the meaning of indent (b) of the first paragraph of Article 177 of the EEC Treaty and that therefore the Court has jurisdiction to give preliminary rulings on its interpretation"[50]. The ECJ explained that "the function of

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[47] The *Nederlandse Spoorwegen Case*, *ibid*, p. 1449, ground 14.

[48] Case 12/86, *Meryem Demirel v. Stadt Schwäbisch Gmünd*, [1987] ECR, p. 3719, at 3751, ground 11; Previously declared in the cases *Haegeman* and *Kupferberg*.

[49] Case 181/73, *R.& V. Haegeman v Belgian State*, [1974] ECR, p. 449, at 459, ground 2.

[50] *Opinion 1/91*, *op. cit.*, p. I-6105, ground 38. The similar wording was used in the previous cases, as for example in the *Haegeman Case*, *op. cit.*, p. 459, ground 3; and in Joined Cases 267 to 269/81, *Amministrazione delle Finanze dello Stato v. Società Petrolifera Italiana SpA (SPI) and SpA Michelin Italiana*

Article 177 of the EEC Treaty is to ensure the uniform application throughout the Community of all provisions forming part of the Community legal system and to ensure that the interpretation thereof does not vary according to the interpretation accorded to them by various Member States"[51], the competence that includes also the interpretation of the international agreements. As the ECJ stated in the *Kupferberg case*, "it is for the Court, within the framework of its jurisdiction in interpreting the provisions of agreements, to ensure their uniform application through the Community"[52].

Such a position of the ECJ could provoke some dilemmas. First of all, the ECJ has based its competence on the fact of the existence of legal act, but has never attached any importance to the possible effects of this act within the Community law *stricto sensu*. An international agreement could be concluded by the Council in a form of regulation or decision, and their respective effects could be different within the Community law *stricto sensu*. But as the ECJ considers that those acts do not transform a norm having origin in international law and do not affect the international nature of the obligations and rights contained in international agreements, the form of the act concluding agreement does not have any importance[53]. Consequently, the form

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(SAMI), [1983] ECR, para. 2 of the ruling (concerning the Tariff Protocols to GATT of 16 July and 30 June 1967). The same in the *Singer Case, op. cit.*, p. 861, ground 2.

[51] Case C-192/89, *S. Z. Sevince v. Sttatssecretaris van Justitie*, [1990] ECR, p. I-3461, at I-3501, ground 11.

[52] The *Kupferberg Case, op. cit.*, pp. 3662-3663, ground 14.

[53] This act still has to be legally binding. It should be noted that the ECJ denied any legal effect of the different political decisions of the Council. For example, in the *Schlüter*

of the act does not preclude any possible effect of the agreement concluded by this act[54]. Therefore, the competence of the ECJ is based on the fact that it has no further importance. So, it is not a form of act that gives the competence of interpretation to the ECJ, but rather its binding character and commitments undertaken, which, being part of the Community system, have to be duelly performed. Furthermore, it can be argued that the binding character of agreement on the Community institutions (Article 228), includes obligation for the ECJ to ensure the full effects of agreement according to its internal competencies, as far as it concerns the Community. The Advocate General Trabucchi interpreted the Court's *Haegeman* position as that it "may be taken to mean, as against those subject to the legal system of the Community, an international agreement is valid not in itself as a term of an agreement effective under international law but as result of an act of the Community institution."[55]

As for the pre-conditions for examining the direct effect of agreements, the ECJ explained that "before invalidity can be

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Case, the ECJ denied the direct effect of the Council's resolution of 22 March 1971 "which is primary an expression of the policy favoured by the Council and Government Representatives of Member States concerning the establishment of an economic and monetary union ...", *op. cit.*, p. 1161, ground 40.

[54] Although Louis states that "*le recours à des règlements remonte à 1968 et procède de l'idée que les accords tarifaires et commerciaux comportant une modification de position du tarif douanier commun, lui-même établi sous forme de règlement, il convenait de prendre un règlement pour assurer l'automaticité indiscutable de l'action de l'accord dans l'ordre juridique communautaire*", J.-V. Louis, "Mise en oeuvre des obligations internationales de la Communauté dans les ordres juridiques de la Communauté et de ses Etats membres", *RBDI*, 1977, pp. 122-143, at 136.

[55] The *Bresciani Case*, *op. cit.*, p. 147.

relied upon before a national court"[56], another condition (in addition to the agreement's binding character), should be satisfied. A provision of international law "must also be capable of conferring rights on citizens of the Community which they can invoke before the courts"[57]. It is not clear what could be a real scope of this condition, in particular whether the ECJ, by the wording "national court" and this second condition, wanted to keep for itself a competence to examine capability of agreements of conferring individual rights, because this condition represents in fact the final conclusion to reach and not a condition. And this conclusion, as the ECJ has already ruled, is to be reserved for the ECJ. As was concluded by Rideau, "*ce n'est pas le fait que l'accord engendre des droits pour les justiciables qui sera la condition de l'examen, c'est la nature des obligations résultant de l'accord, qui determinera si le juge est en mesure ou non de contrôler par rapport à lui l'acte mis en cause, autrement dit d'assurer son application juridictionnelle*"[58]. It should be noted that this condition seems abandoned in the cases *Schroeder* and *Haegeman*, where the ECJ have not examined the direct effect as a pre-condition for examining a validity of an act[59]. Furthermore, in the *Nederlandse*

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[56] The *International Fruit Company Case*, *op. cit.*, p. 1226, ground 7.

[57] The *International Fruit Company Case*, op. cit., p. 1226, ground 8 and p. 1229, para. 1 of ruling.. In the *Schlüter Case*, the ECJ used wording "capable of creating rights of which interested parties may avail themselves in a court of law", *op. cit.*, p. 1157, ground 27.

[58] Joël Rideau, "Les accords internationaux dans la jurisprudence de la Cour de Justice des Communautés européennes: Réflexions sur les relations entre les ordres juridiques international, communautaire et nationaux", *RGDIP* (1990), p. 287-418, at 362.

Spoorwegen Case[60] the Advocate-General Reischl repeated this condition referring to the jurisprudence of the *International Fruit Company* and *Schlüter*[61], but the ECJ did not rely on this argument. In fact, in the same Case, the Commission clearly demonstrated in its observation that the 1950 Convention on Nomenclature for the Classification of Goods in Customs Tariffs was binding for the Community, but that there can be no question that it entails individuals to avail themselves thereof in the courts[62].

At the later stage, the ECJ expressed the necessary conditions for the direct effect of international agreements in a manner more similar to that already established for the Community law *stricto sensu*. In this sense, the ECJ declared, as in the *Demirel Case* that "the provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure"[63]. Some persons, including the Advocate General Rozés, have drawn a conclusion that such a wording represents just a

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[59] Although it should be noted that the Commission repeated this requirement in the *Polydor Case*, Case 270/80, *Polydor Limited and RSO Records Inc. v. Harlequin Record Shops Limited and Simins Records Limited*, [1982] ECR, p. 329, at 343.

[60] The *Nederlandse Spoorwegen*, *op. cit.*, p. 1439.

[61] *Ibid*, p. 1457.

[62] *Ibid*, p. 1444.

[63] The *Demirel Case*, *op. cit.*, p. 3752, ground 14. Repeated later in the Case 18/90, *Office national de l'emplio (Onem) v. Bahia Kziber*, ECR [1991], p. I-199, at I-225, ground 15.

simple transposition of the general conditions that the ECJ has defined in the context of the Community law *stricto sensu*. In the *Pabst Case*[64], she explained that two conditions must exist in order to recognize the direct effect of an international agreement's provision. The first condition, as presented by Mrs. Rozés, was a simple reference to the *Lütticke Case*, i.e., to the Community law *stricto sensu*. Just the second condition was related to the quality of the legal order that could be established by the agreement in question, including considerations of "the spirit and general plan" of the agreement[65].

It should be also noted that the ECJ has never taken into serious consideration, as for possible obstacle to its competence, the fact that an international agreement has been concluded in a form of so-called "mixed agreement", i.e., concluded simultaneously by the Community and its (some or all) Member States. The ECJ avoided to rule explicitly on this issue in the *Demirel Case*. After remarks of the German and United Kingdom Governments that, in the case of "mixed agreements", as it was the case of the Association Agreement with Turkey, the Court's interpretative jurisdiction does not extend whereby the Member States have entered into commitments in the exercise of their own powers, the ECJ, after stating that freedom of movement of workers falls within the scope of the Treaty, concluded that some commitments "at least to a certain extent" must take part in the Community system and that "Article 228 must necessarily empower the Community to guarantee commitments towards non-member countries

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[64] Case 17/81, *Pabst & Richarz KG v. Hauptzollamt Oldenburg*, [1982] ECR, p. 1331.

[65] The *Pabst Case, op. cit.*, pp. 1358-1359.

in all fields covered by the Treaty"[66]. Similar was the situation in the *Bresciani Case* in which the ECJ, in interpretation of the Yaoundé Convention, just mentioned that "it was concluded in the name not only the Member States but also of the Community which, in consequence, are bound by virtue of Article 228"[67], but the fact that that was a clear case of shared competence between the Member States and the Community did not effect the competence of the ECJ. Again, for the ECJ the only important fact seems to be that there exists an act of the Council concluding the agreement in question[68]. In the *Haegeman Case*, the ECJ made a reserve stating that the Agreement is "in so far as concerns the Community, an act of the institutions...", in order to justify its jurisdiction based on article 177 of the EEC Treaty. In the recent case No. C-316/91, *European Parliament v. Council of the European Union*[69], not based on Article 177, the ECJ entered into analysis of the Fourth APC-EEC Convention, in order to identify the parties which have entered into commitments *vis-à-vis* the ACP States. As this Convention was concluded in a form of "mixed

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[66] The *Demirel Case, op. cit.*, at 3751, ground 9.

[67] The *Bresciani Case, ibid*, p. 140, ground 18.

[68] Although the Advocate General Trabucchi explained in the *Bresciani Case* that

> "[i]t is true that the convention is of necessity a bilateral or multilateral instrument and, as such, does not lend itself to identification with the acts of the Community executive, which are inherently unilateral. Nevertheless, the definition of the scope of a State's Community obligation is always a question of interpreting Community law and it is, therefore, not necessary to base the Court's jurisdiction to give a preliminary ruling in such circumstances on the assimilation of the international convention to an act of a Community institution", *op. cit.*, p. 147.

[69] [1994] ECR , p. I-625.

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[69] [1994] ECR , p. I-625.

agreement" without specification of their respective commitments in the text of the Convention, the ECJ ruled in accordance with the respective competencies based on the Treaty provisions, concluding that in the field of development aid the Community does not have an exclusive competence and that consequently, the Member States had the right to preform their commitments independently *vis-à-vis* the ACP States.

The ECJ has been also in a situation to interpret a decision of an institution created by international agreement. In the *Sevince Case*, the ECJ was asked by a national court (*the Raad van State, Netherlands*) whether an interpretation of decisions of the Council of Association may be given under Article 177 of the EEC Treaty. The Court held that "since they are directly connected with the Agreement to which they give effect, the decisions of the Council of Association, in the same way as the Agreement itself, form an integral part ... of the Community legal system". Therefore, as the ECJ has a jurisdiction to give the preliminary ruling on the Agreement, it has also jurisdiction "to give rulings on the interpretation of the decisions adopted by the authority established by the Agreement and entrusted with responsibility for its implementation"[70].In the *Kus Case*[71], the ECJ gave an interpretation of Article 6 of the Decision No. 1/80 of the Association Council established by the Association Agreement between the Community and Turkey. Although the German Government had requested the ECJ to reconsider its competence to interpret a decision adopted by the organ established by the

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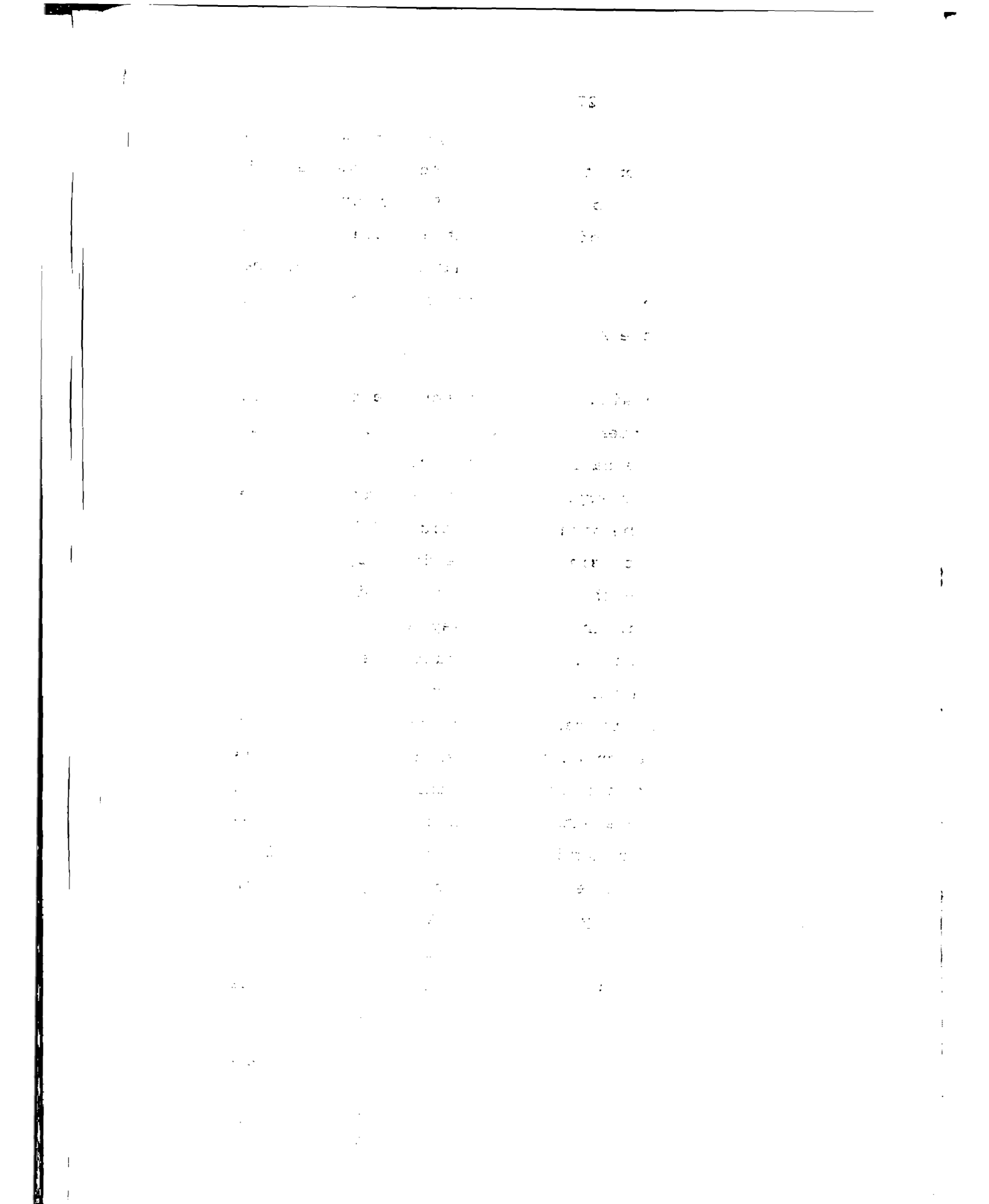
[70] This competence was established in the *Sevince Case, op. cit.*, grounds 9-10, at p. I-3501.

[71] The Case C-237/91, *Kazim Kus v. Landeshauptstadt Wiesbaden*, [1992] ECR, p. I-6807, at I-6811, ground 9.



association agreement on the basis of Article 177[72], the ECJ only made a reference to its earlier *Sevince* position, stating that no new elements appeared in the *Kus Case*[73].

3. METHODS OF INTERPRETATION

2.1. THE COMMUNITY LAW *STRICTO SENSU*

The exclusive interpretation competence within the Community law enabled the ECJ to choose, among different theoretical methods[74] of interpretation of legal norms, its preferable method of interpretation applicable to the Community law. In other words, the ECJ is the master of its own method of interpretation of legal norms within the Community legal system. Such a possibility determined the ECJ more as a constitutional court in terms of one of the Communities' institutions charged to fulfil certain task, rather than "external" organ meanly aimed to resolve disputes between the parties[75].

That was probably one of the main reasons that the ECJ has, from the very beginning of its jurisprudence, favoured a teleological and a systematic method of interpretation of the Community legal

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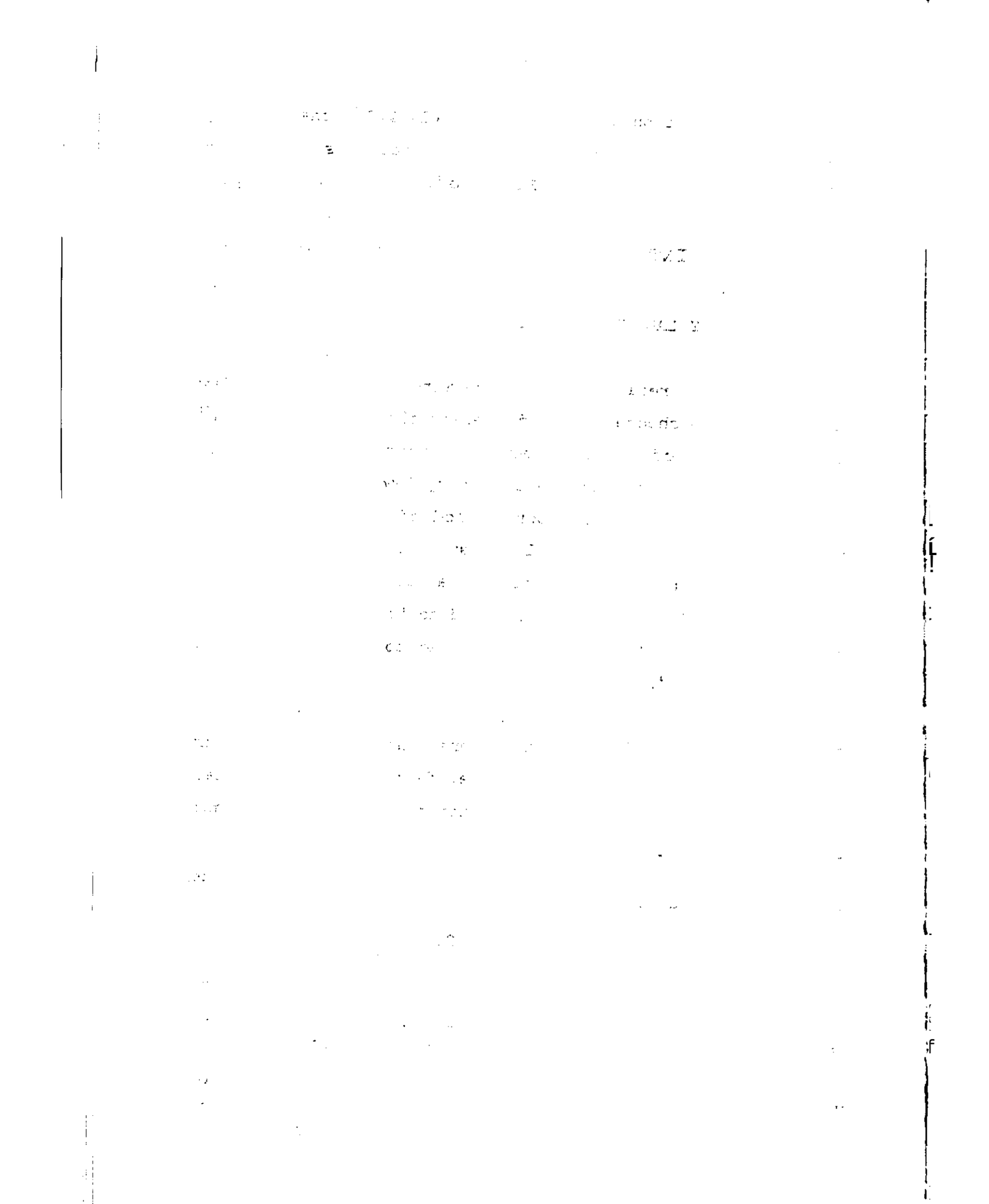
[72] See arguments of the German Government presented in the *Sevince Case, op. cit.*, p. I-3469.

[73] The *Kus Case, op. cit.*, ground 9.

[74] For a list of publications on this issue, *see*, Stuart S. Malawer, "International Law, European Community Law and the Rule of Reason", 8 *Journal of World Trade Law* 1 (1974), pp. 17-74, note 120 at 46.

[75] For the different definitions of the European Court of Justice's competencies, *see* Renaud Dehausse, *op. cit.*, *supra* note 6, pp. 19-32.



norms, rather than a literal one. By such an approach, the Court has differentiated itself and consequently the Community legal order from the classical international law[76], where teleological and systematical methods of legal acts interpretation are not unknown, but often literal method of interpretation prevails. In the *Van Gend & Loos Case* the Advocate General Roamer suggested to the Court to take into consideration the "wording, the content and the context of the provision to be interpreted"[77]. In its analysis, the Advocate General based most of his consideration on wording of the Treaty, and especially of its Article 12. This analysis included designation of the addressee of the Article 12 as well as words chosen[78]. In its ruling, the Court, in a way that had important impact on further development of the direct effect concept, changed the order of the proposed elements for interpretation of the Community provisions, stating that it is necessary to consider "the spirit, the general scheme and the wording of those provisions"[79].

In later cases, the Court relativized further the importance of wording, especially as it concerned the formal addressee of provision in question[80]. This approach has got more importance in

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[76] For attempts to place the European Community law in the framework of the general system of international law, *see*, e.g., Stuart S. Malawer, *op. cit.*, *supra* note 74, p. 26-27.

[77] *Op. cit.*, p. 24.

[78] *Ibid*, pp. 22-24.

[79] *Ibid*, p. 12.

[80] For example in the case of *Defrenne*, the Court confirmed that "[i]ndeed, as the Court has already found in other contexts, the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has interest in

the case of direct effect of directives, where the analysis of simple wording would have prevented the Court of Justice to establish the direct effects. But, as the Court stated in the *SACE Case* that "*il convient de considérer non seulement la forme de l'acte en cause, mais encore sa substance ainsi que sa fonction dans le système du traité*"[81].

The interpretation of a provision in question in its context enabled the ECJ to take into consideration other norms contained in the same legal act, and even those contained in different acts.

All these methods have given to the ECJ the possibility to follow dynamics of the Community law[82], and in fact, to adapt its interpretation to development of this system of law[83].

Such a policy-oriented approach[84] of the Court has had an influence on all arguments presented in favour of the direct effect of the Community provisions. It can be argued that by such an approach, the ECJ has abandoned the classical method of

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the performance of the duties thus laid down", Case 43/75, *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] ECR, p. 475, ground 31.

[81] Case 33-70, *Spa SACE contre ministère des finances de la République italienne, Recueil* [1970], p. 1223, point 13.

[82] *See*, e.g., Michel Walbroeck, "Le rôle de la Cour de justice dans la mise en oeuvre du traité CEE", in: *Les effets des decisions de la Cour de justice des Communautés européennes dans les Etats membres*, (Bruxelles: Uga, 1980), pp.183-216, at 188-201

[83] On several occasions, the ECJ made reference to "the state of Community law for the time being", for example the *Kupferberg Case, op. cit.*, p. 3662, ground 12.

[84] Freestone & Davidson, *op. cit., supra* note 13, p. 29.

interpretation of international agreements established in international law, namely the intention of contracting parties, mostly expressed in the wording of agreements. It is generally accepted that this practice, as it concerns the possible direct effect of an international instrument, was confirmed and explained by the Permanent Court of International Justice's judgment in the *Danzing Case*.[85] Within the Community law, on the contrary, as it was expressed by Winter, the interpretation of the European Court of Justice aimed "... not what the drafters of the Treaty had in mind but what they ought to have in mind"[86] The ECJ probably considered that, by establishing an independent judiciary organ having a competence to interpret the Treaties, the contracting parties have expressed clearly their intentions[87].

One of the most important interpretative principles which enabled the ECJ to develop its own way of teleological interpretation is the notion of the effectiveness ("*effet utile*"). From the very beginning of its jurisprudence, the European Court has had the preoccupation how to make Community law more effective. It is in this context that the development of the direct effect theory within the Community law could be observed and explained.

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[85] Advisory Opinion of March 3, 1928, Recueil de la CPIJ, Série B, 1928.

[86] Winter, *op. cit.*, *supra* note 13, p. 433.

[87] As Winter pointed out, "it is the Court of Justice which has removed from member States the power to determine the scope of their commitments unilaterally and to draw the customary conclusions from the method in which they have incorporated the Treaty in accordance with their respective constitutional laws. Thus the Court has seized complete control over the question of interpretation of the direct applicability of Treaty law.", Winter, *op. cit.*, supra note 13, p. 431.

Pescatore expressed this Courts' preoccupation in the following words: "The exploration of the relevant case-law shows that the dominant preoccupation of the European Court is to ensure in all the circumstances the operative character of the rules of Community law"[88] and explained that "[i]t was thus a highly political idea, drawn from a perception of the constitutional system of the Community, which is at the basis of Van Gend en Loos and which continues to inspire the whole doctrine flowing from it"[89].

In many judgments, the Court of Justice referred to the effectiveness of the Community law, although it can be argued that this is not a legal but policy argument[90]. For example, the ECJ declared that "[i]n particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law."[91]

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[88] P. Pescatore, ""The Doctrine of 'Direct Effect': An Infant Disease of Community Law", *European Law Review* 8 (1983),p. 177.

[89] Pescatore, op. cit. supra note 54, 88, p. 158.

[90] *See* Hartley, *op. cit. supra* note 9, p. 202.

[91] Case 41/74, *Yvonne van Duyn v. Home Office,* [1974] ECR, p. 1337, at 1348, ground 12. In the *Becker Case,* the ECJ repeated the same formulation adding to it a word "effectiveness", Case 8/81, *Ursula Becker v. Finanzamt Münster-Innenstadt,* [1982] ECR, p. 53, at 70-71, ground 23; See also Case C-188/89, *A. Foster and Others v. British Gas plc,* [1990] ECR, p. I-3313, at I-3347, ground 16.

In the *Defrenne Case*, the Court of Justice explained that

> "[t]he effectiveness of this provision [Article 119] cannot be affected by the fact that the duty imposed by the Treaty was not discharged by certain Member States and that the joint institutions have not reacted sufficiently energetically against this failure to act.
>
> To accept the contrary view would be to risk raising the violation of the right to the status of principle of interpretation, a position the adoption of which would not be consistent with the task assigned to the Court by Article 164 of the Treaty"[92].

In cases where it was not possible to ensure by the Community law itself, the Court of Justice imposed this obligation on the Member States by saying that "Member States are required to adopt measures which are sufficiently effective to achieve the objective of the directive and to ensure that those measures may in fact be relied on before the national courts by the person concerned"[93].

In this regard, the direct effect could be explained as a form of control of the implementation of the Community law, by the individuals. Weiler even expressed an opinion that "individuals ... became the principal 'guardians' of the legal integrity of Community law"[94]. It is a form of sanction intended to make the Community law more effective than classic international law. In a number of cases, especially regarding direct effect of directives, the Court explains that a "Member State that has not

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[92] *Op. cit.*, p. 475, grounds 33 and 34.

[93] Case 14/83, *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, [1984] ECR, p. 1907, point 18.

[94] J.H.H. Weiler, "The Transformation of Europe", 100 *The Yale Law Journal* (1991), p. 2414.

adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligation"[95].

The direct effect has for its task to reinforce the system established by the Articles 169 and 170 of the EEC Treaty. The Court explained that in *Van Gend & Loos* by stating that:

> "The fact that these Articles of the Treaty enable the Commission and the Members States to bring before the Court a State which has not fulfilled its obligations does not mean that individuals cannot plead these obligations, should the occasion arise, before a national court, any more than the fact that the Treaty places at the disposal of the Commissions ways of ensuring that obligations imposed upon those subject to the Treaty are observed, precludes the possibility, in actions between individuals before a national court, of pleading infringements of these obligations"[96].

This position of the Court of Justice has two purposes: first, restriction to procedure under Article 169 and 170, would "remove all direct legal protection of the individual rights of their nationals", and second, is inspired by primacy and effectiveness of the Community provisions, by saying that :

> "there is a risk that recourse to the procedure under those Articles would be ineffective if it were to occur after the implementation of national decision taken contrary to the provisions of the Treaty"[97].

This procedure is thus not alternative but complementary to those

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[95] Case, 152/84, *M.H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)*,[1986] ECR, p. 723, at pp. 748-749, ground 47. The same already stated in the *Becker Case, op. cit.*, p. 71, ground 24.

[96] *Op. cit.*, p. 13.

[97] *Ibid.*

in Articles 169 and 170.[98] As the Court stated, the "vigilance of individuals to protect their rights would amount to an effective form of supervision of the Treaty"[99]

In regard to the directive, the Court has, in absence of the conditions required for its direct effect, established the indirect effect of the directives even before the expiry of a time-limit for its implementation by the Member States. The Court states that "in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of wording and the purpose of the directive, in order to achieve the result pursued by the letter ..."[100]. The Court explained it as an obligation for the national courts, to comply with Article 189 and 5 of the EEC Treaty, stating that the obligation for the Member States to insure the fulfilment of the obligation imposed by those Articles "is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts"[101].

In the context of effectiveness the ECJ established even a State liability for breach of the Community law, as the next step in

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[98] "The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by articles 169 and 170...", *Van Gend & Loos, supra*, p. 13.

[99] The *Van Gend & Loos* Case, *op. cit.*, p. 12.

[100] Case C-106/89, *Maerlising SA and La Comercial Internacional de Alimentacion SA*, [1990] ECR, p. I-4159, ground 8. In the same sense the *Johnston Case, op. cit.*, p. 1690, ground 53.

[101] *Ibid*. The same in the Johnston Case, op. cit., at 1690, ground 53.

reinforcing the effectiveness of the Community law. In the *Francovich Case*, the ECJ held that

> "the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infriged by a breach of Community law for which a Member State can be hel responsible.
>
> The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, a full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by the Community law"[102].

3.2. INTERNATIONAL AGREEMENTS

The ECJ could have not established a completely different criteria for the interpretation of the international agreements of those presented to the interpretation of the Treaties and the Community secondary legislation. But, while the competence of interpretation of the Treaty is defined in the Treaty itself and thus gives to the ECJ the possibility to interpret the Community legislation according its preferences, in a case of the Community law *lato sensu*, even the ECJ itself makes a reference to its obligation to interpret an international agreement according to a more general international instrument than the EEC Treaty. In this context, the ECJ has made specific reference to the 1969 Vienna Convention. For example, in the *Opinion 1/91*, the ECJ

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[102] Joined Cases C-6/90 and C-9/90, *Andrea Francovich v. Italain Republic; Daniala Bonifaci and Others v. Italian Republic*, [1991] ECR, p. 5357, at 5414, ground 33 and 34.

explained that "Article 31 of the Vienna Convention of 23 May 1969 on the law of treaties stipulates in this respect that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and the light of its objects and purpose"[103]. Referring to the same Convention in the *Anastasiou Case*, the ECJ added to this explanation that the Convention "substantial importance properly attaches ... to any subsequent practice in its application"[104]. This reference to the interpretation according to principles of international law, is a consequence of the different origins of the provions of the international agreements. The ECJ explained its position in more detail in the *Kupferberg Case*. It stated that "it is true that the effects within the Communuty of provisions of an agreement concluded by the Community with a non-member country may not be determined without taking into account of the international origin of the provision in question" and that "according to the general rules of international law there must be *bona fide* performance of every agreement"[105]. In addition, in the Anastasiou Case, the ECJ stated that "the Community must take particular account of its partner to the Agreement when interpreting and applying it"[106]

The ECJ considers, in the already mentioned *Opinion 1/91* concerning double position of the ECJ's judges in the EEA Court,

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[103] The *Opinion 1/91*, *op. cit.*, p. I-6101, point 14.

[104] Case C-432/92, *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and Others*, [1994] ECR, p. I-3087, at I-3132, ground 43.

[105] The *Kupferberg Case*, *op. cit.*, p. 3663, grounds 17 and 18.

[106] The *Anastasiou Case*, *op. cit.*, p. 3133, ground 46.

that approaches, methods and concepts of interpretation of the EEC and EEA Treaty are different[107]. But still, the ECJ has maintained basically its approach applied to the interpretation of Community law *stricto sensu*, stating that always the spirit, the general scheme and the terms of the agreement must be considered[108]. In the *Bresciani Case*, to the same expression was added "and of the provision concerned", which is probably the most correct presentation of the ECJ method. In later cases, the ECJ expressed basically the same thing by analysing "the nature of each treaty and its particular objectives"[109] or "the meaning, the structure, and the wording"[110] of the agreement in question. It should be noted that the ECJ thus never analyzed the intention of contracting parties expressed in the preparatory works.

By using a similar method for the different types of legal acts, the ECJ has reached different conclusions, which will be tried to be explained below in more detail. But just as a preliminary remark, it can be concluded that the ECJ had to take into consideration, apart from its own approach to the interpretation of Community law, some principles of international law.

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[107] *Opinion 1/91, op. cit.*

[108] *The International Fruit Company Case, op. cit.*, p. 1227, ground 20.

[109] *Opinion 1/91, supra*, 51, p. I-6108.

[110] The *Schlüter Case, op. cit.*, p. 1157, ground 28.

4. GENERAL LEGAL BASIS FOR DIRECT EFFECT WITHIN THE COMMUNITY LAW *STRICTO SENSU*

Generally speaking, it is possible to conclude, from the case-law of the European Court of Justice that there were three phases in establishing the direct effect principle within the Community law *stricto sensu*:

First, the European Court of Justice stated that the EEC Treaty represents a specific international agreement and that individuals within the Community are active subjects of the legal system created by this Treaty. This phase could be described as a process of "constitutionalization" of the founding treaties[111];

Second, the legal system based on the EEC Treaty, i.e. all secondary legislation issued by the Community institutions could create effects directly for individuals. This point is important because the case-law of the European Court of Justice implies that one should always have in mind the specific characteristics of the provision in question and not the legal act itself[112], but still the legal nature of the act creates a legal basis for the provision in question.

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[111] Alex Easson, "Legal Approaches to European Integration: The Role of Court and Legislator in the Completion of the European Community Marker", 12 *Revue d'integration européenne* (1989), p. 101-119, at 102 *et seq.*

[112] Although it may seem contradictory to the ECJ's general line, the Court has ruled in the *Van Duyn Case* that "legal certainty for the persons concerned requires that they should be able to rely on this obligation even though it has been laid down in a legislative act which has no automatic direct effect in its entirety." The *Van Duyn Case, op. cit.*, supra note 91, p. 1348, ground 13.

Third, the European Court has established the specific requirements for direct effect of each provision capable of producing direct effects. Those criteria were formulated by the pertinent jurisprudence of the European Court of Justice;

In the present paper, an attempt at systematisation of the main lines of both case-law of the European Court of Justice and doctrine will be presented.

4.1. LEGAL NATURE OF THE EEC TREATY

In order to establish a legal basis of the direct effect which will be more in service of the purpose of the Treaties than conformed to classic international law, the Court had to find specific definition of the EEC Treaty. The concept of direct effect needed for its basis, and on the other hand contributed, to difference of the classic international law from the legal system created by the Treaty of Rome. In the *Van Gend & Loos Case*, "arguably the single most important judgment ever delivered by the Court and one of the turning points in the history of the Community"[113], the *Tariefcommissie* made a request to the ECJ for the preliminary ruling on the question of whether Article 12 of the EEC Treaty has direct application within the territory of a Member State, in other words, whether nationals of such a State can, on the basis of the Article in question, claim their individual rights which the courts must protect. These questions inevitably sought answer to more general issues of the European Community law, and the Court issued a judgment which has marked the further development in this matter. Most of the arguments given by the Court in this Case will have to be presented below

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[113] Easson, *op. cit.*, *supra* note 111, 111, p. 103.

because they have a decisive impact on the classification of arguments in the present paper.

Due to the importance of the issue, three governments presented their opinion before the Court. All three of them were hostile to the idea of any other interpretation of the Treaties than one in the context of general principles of the international law. The Government of Netherlands argued in this case that "EEC Treaty does not differ from a standard international treaty"[114]. The Belgian Government considered it also as an international treaty equal to the others (i.e., the Brussels Protocol), and argued that its legal force within national legal system should be resolved depending on the national law of its ratification[115]. The German government shares the opinion that the Treaty (in this specific case just Article 12) imposes an international obligation which must be implemented by national authorities endowed with legislative powers.

On the contrary, the Commission stated that the Treaties represent a far-reaching legal innovation and that it would be wrong to consider them in the light only of the general principles of the law of nations[116]. Similar opinion was expressed by the Advocate-General Roamer in terms that "[a]nyone familiar with Community law knows that in fact it does not just consist of contractual relations between a number of States considered as subjects of the law of nations"[117].

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[114] *Ibid*, p. 8.

[115] *Ibid*, p. 6.

[116] *Ibid*, p. 20.

[117] *Ibid*.

The Court had the possibility to remain in the context of the interpretation of the traditional international law[118], and consequently to interpret the EEC Treaty as an international agreement providing obligation just for the parties, or to establish the new legal basis for its interpretation as a specific creation of the international law[119].

If defined as a traditional international treaty, the EEC Treaty should have followed the classic interpretation theories of international law. This approach would have resulted in the interpretation of the intention of the parties, represented firstly in the wording of its text, as a decisive element in order to decide on the possible effect to the individual rights conferred by the treaty.

On the contrary, although declaring that the EEC treaty is an international treaty the Court stated that it "is more than an agreement which merely creates mutual obligation between the contracting states". To come to this conclusion[120], the Court

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[118] As the founding Treaties were concluded by the States and therefore all legal system was analyzed, at the first place, by the academics and specialists of the international public law, it had as a consequence inevitable attempts to place the Community law and the Treaties within the traditional scheme of the international law.

[119] Easson expresses this opinion in the following words: "The Court of Justice was thus faced with a clear choice, between a literal approach - that the provision, being addressed only to states, was binding only upon them - thus observing the principle that transfers of sovereignty are to be interpreted narrowly, and a goal oriented approach, seeking by interpretation to further social, economic and political integration", *op. cit., supra note* 111, 111, p. 104.

presented five major arguments:

1. that the objective of the EEC Treaty is to establish a Common market, the functioning of which is of direct concern to interested parties in the Community;
2. That the preamble to the Treaty refers not only to governments but to peoples;
3. That the establishment of the institutions of the Community endowed with sovereign rights and their exercise affects Member States and also their citizens;
4. That the nationals of the States brought together in the Community are called upon to cooperate in the functioning of the Community through the intermediary of the European Parliament and the Economic and Social Committee;
5. That the task assigned to the Court of Justice under Article 177 confirms that the states have acknowledged that Community law can be invoked by their nationals before the national courts and tribunals.

In the *Costa Case*, the ECJ, after the words "[a]s opposed to other Treaties", added to those arguments unlimited duration of the Community, its own personality, its own legal capacity of representation on the international plane and real powers stemming from the limitation of States' sovereignty or a transfer of powers from the States to the Community[121]. The Court thus has

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[120] Weiler points out that the this ruling was based on a judicial-constitutional contract idea. *See*, Weiler, *op. cit. supra* note 94, p. 2451.

not limited its argument on the wording of the Treaty, although, it had to find some literal basis for its reasoning.

As a consequence the Court concluded that "the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member states but also their nationals."[122]

It should be noted that the Court used in *Van Gend & Loos* the wording "international law", which was omitted later in the *Molkerei-Zentrale Case*[123], which defined Community law as a new order of law". In the *Costa Case*, the Court made it clear that it considers the EEC treaty different from ordinary international treaties by saying: "By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal system of the Member States and which their courts are bound to apply"[124]. Further, in the *Simmenthal Case* the Court made clear that the Member States have undertaken "unconditionally and irrevocably" their obligations pursuant to the Treaty[125], which is not so characteristic for classic international agreements.

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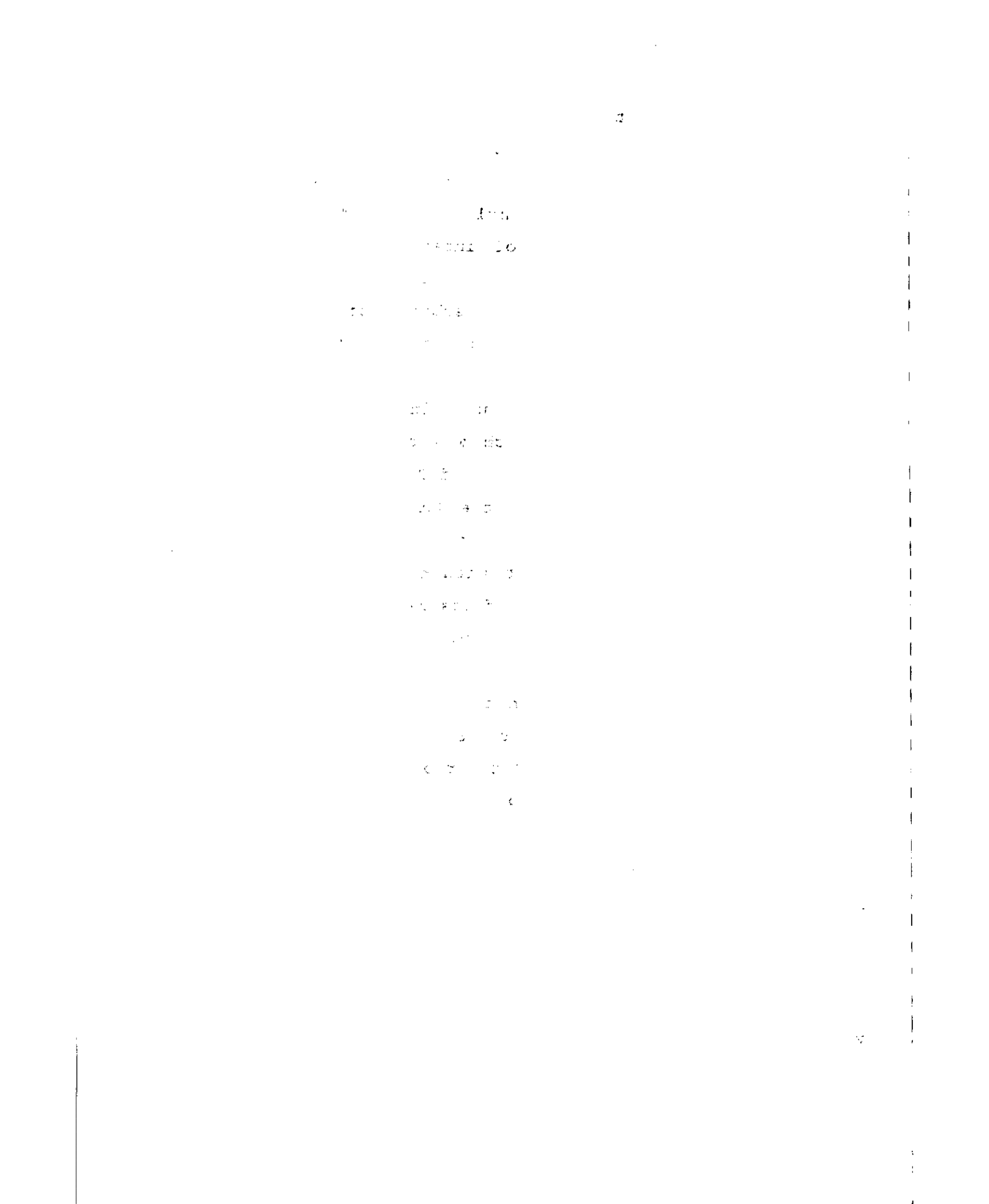
[121] *Op. cit.*, p. 593.

[122] The *Van Gend & Loos Case*, *op. cit.*, p. 12.

[123] Case 28-67, *Firma Molkerei-zentrale Westfalen/Lippe GmbH v. Haumptzollamt Paderborn*, EAR [1968], p. 211.

[124] *Op. cit.*, p. 593.

[125] The *Simmenthal Case*, *op. cit.*, p. 641, ground 18.



A further step in the specific definition of the EEC Treaty was introduced later, in the judgment of April 23, 1986, *Parti écologiste "Les Verts" v. European Parliament*, in which the ECJ referred to the Treaty as "the basic constitutional charter"[126]. This position was confirmed in the recent *Opinion 1/91*, in which the Court stated that EEC Treaty, "albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law"[127].

Although the Court states that "[t]he transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights"[128], some supreme national jurisdiction seem not to share entirely the Court's opinion. For example, the Belgian *Cour de Cassassion* stated in the famous *Le Ski Case*[129], that Member States have limited just "*l'exercice de leurs droits souveraigns*".

While in the *Van Gend & Loos*, the Court had a reason to speak about the limited fields[130], in *Opinion 1/91*, almost thirty years later, the Court had even more reason to state that States have

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[126] Case 294/83, [1986] ECR, p. 1339, at 1365 para. 23.

[127] *Op. cit.*, p. I-6102, point 11.

[128] The *Costa Case*, *op. cit.*, p. 594.

[129] *Fromagerie Le Ski*, CMLR (1970), p. 219.

[130] Weiler explains that expression as "[i]t was inviting the supreme Member State courts to accept the new legal order with understanding that it would, indeed, be limited in its fields", *op. cit.*, *supra* note 94, p. 2451.

limited their sovereign rights "in ever wider fields"[131]

It should be added here that the EEC treaty is silent regarding the question of its formal reception by the Member States. Having in mind different internal, and more precisely constitutional solutions on the relation of the international and national law in the Member States of the Communities, the EEC Treaty tried to avoid any controversy regarding its formal reception by the Member States. On the contrary, once ratified according internal legal procedure, the Treaty produces its effects independently of the national legal systems: it has its own interpreter and becomes an integral part of the national legal systems. In addition, this Treaty, pursuant to the case law of the ECJ, contains certain provisions capable of producing direct effects and its provisions have priority over national legal acts. At the same time, this Treaty creates a system of law which follows the specific character of the Treaty. As Easson concluded, "[t]he treaties have been transformed into a constitution, which has become an essential part of the law applied by the courts in all the member states."[132]

Following its own method of interpretation, the ECJ has declared as directly effective a number of Treaty articles, both providing a prohibition of action of Member States ("*standstill clauses*") or of those which provide for their action. At the same time, the ECJ declared that some provisions are capable not just of conferring individual rights against the Member States (so-called "vertical direct effect"), but also in actions between

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[131] *Op. cit.*, p. I- 6102, ground 11.

[132] Easson, *op. cit., supra note* 111, 111, page 114.

individuals (so-called "horizontal direct effect").

4.2. DIRECT EFFECT OF THE COMMUNITIES' SECONDARY LEGISLATION

As the Treaty is specific, the consequence is that the entire legal system built on it has a specific character. The European Court established the possibility of direct effect of all binding legal acts of the European Communities' secondary legislation: regulations, decisions and directives, although not with the same arguments and by the using same requirements. It can be argued that, due to the fact that one sort of legal acts does not necessarily contain all provisions capable of producing the direct effect, the provision in question has to be analyzed separately but the ECJ has always established a context of the provision in question. In the first place, it has meant to consider what is the place in the Community law of the legal act in which the provision is contained, then the purpose of the act and finally the analysis of the provision in question.

If for regulations the ECJ has not had major problems to find arguments in establishing their direct effect, for the other binding acts the ECJ stated that "[i]t does not follow from this that other categories of legal measures mentioned in Article 189 could never produce similar effects"[133].

a) *Regulations*

Pursuant to Article 189, para 2 of the EEC Treaty, a regulation

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[133] *See* for exemple Case 9/70, *Grad*, [1970] ECR, p. 825 for a decision and Case 41/74, *Van Duyn*, [1974] ECR, p. 1337 for a directive.

has a general application, is binding in its entirety and is "directly applicable in all Member States". The argument in the wording of the Treaty has been used by the ECJ to explain the effects of the regulations, and their "primary" (original) direct effect consequence. As the Court of Justice explained, the regulation has the direct effect "by reason of its very nature and its function in the system of sources of Community law"[134].

Whether the direct applicability and the direct effect of the regulations are meant to be the same thing could be argued even having in mind the wording of the ECJ concerning the regulations. The Court has constantly, and almost mechanically repeated that the provisions contained in regulations have direct effect but as a consequence of the fact that regulation is directly applicable. It may seem that the Court considers the direct applicability, as the way of implementation of regulation which suppose a restriction imposed on the Member States to transform its text into national legislation, as the general condition of its direct effect. The Court has said that the regulations are directly applicable and as such capable of producing direct effect[135], although in the *Verbond Case* the Court used a peculiar terminology stating that "by virtue of the provisions of Article 189, regulations are directly applicable and, consequently, may by their very nature have direct effects..."(emphasis added). The ECJ has never analyzed a specific provision contained in a regulation according to the general requirements of the direct

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[134] The *Variola Case, op. cit.*, p. 990, ground 8; Case 65/75, *Riccardo Tasca*, [1976] ECR, p. 308, ground 16.

[135] It is because it produces immediate effects that the regulation "as such is capable of conferring on parties rights which the national courts must protect", The *Tasca Case, op.cit.*, p. 308, ground 16.

effect for other Community acts. It seems that their directly applicable character make them automatically capable of producing direct effects. Such an approach, although not widely contested in doctrine[136], raises a question whether the regulations could be always "legally perfect" to produce direct effect, i.e., being a source of individual rights and duties capable to be implemented before a national tribunal[137]. In other word, the question is whether the regulations should fulfil the same requirements as the Treaty provisions, or do the direct effect of specific provision result from the simple fact that they are contained in a regulation. The ECJ seems to support the latter solution, although some legal writers have different opinions[138]. On different occasions, the ECJ has declared that regulations could be "basic" and "implementing"[139]. First ones suppose further implementation measures by the Community institutions, but the Court has never applied this difference to differ the effect of those two categories of regulations.

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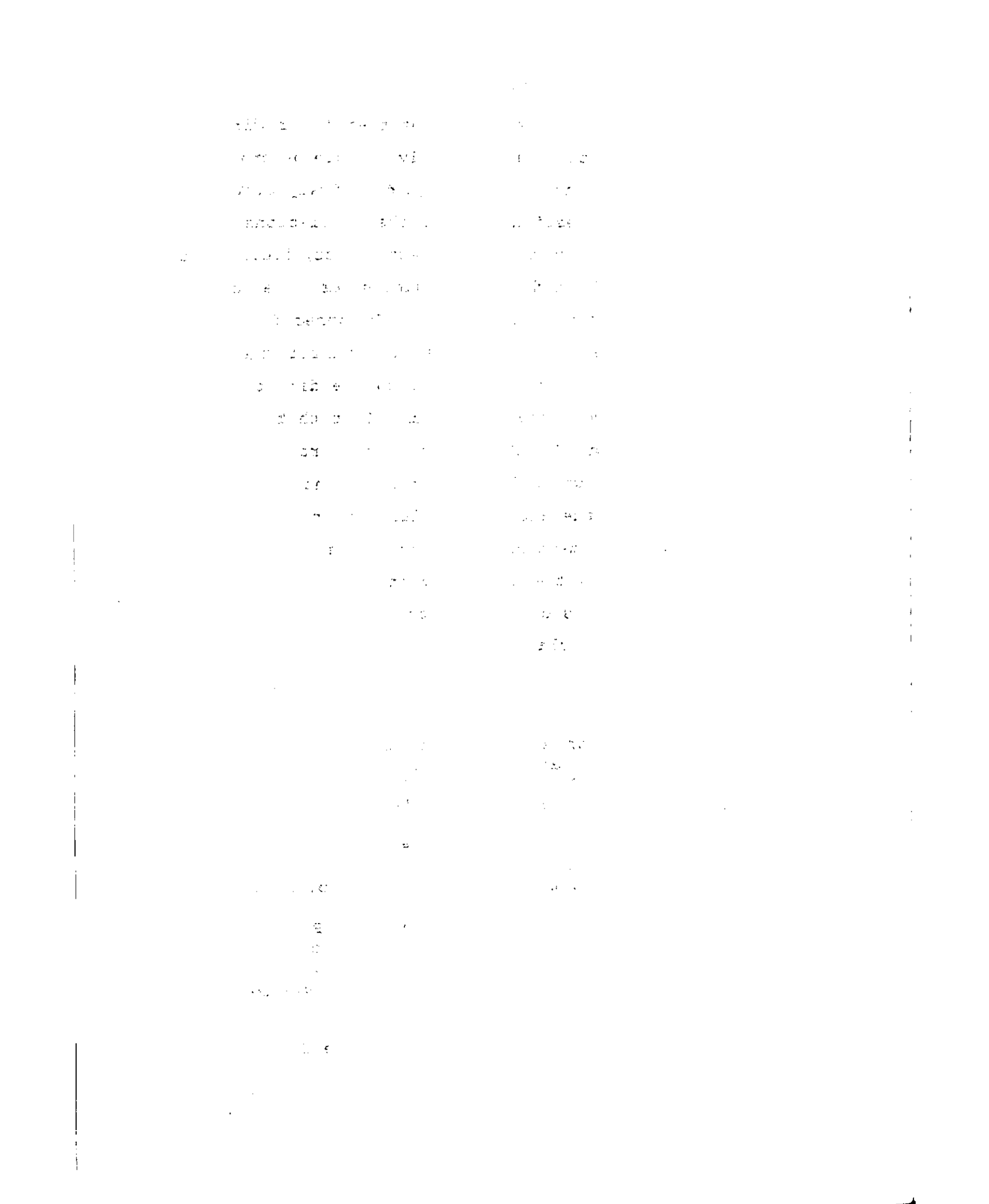
[136] For an example of a different opinion, emphasizing content and not form of an act, *see*, G. Bebr," Directly Applicable Provisions of Community Law: The Development of A Community Concept", 19 *ICLQ* (1970), p. 257-298, at 290-293.

[137] Dashwood interpreted the ECJ's position as that "regulations are far more likely to be directly effective than other types of act...", *op. cit., supra* note 13, p. 241.

[138] *See*, e.g., Walter van Gaven, "The Legal Protection of Private Parties in the Law of the European Economic Community", in: F.J. Jacobs (ed.), European Law and Individual, (Amsterdam-New York- Oxford: Noth-Holland Publish. Comp., 1976), p. 1, at 8.

[139] See explanation given by the Court in the *Zukerfabrick case*, Joined Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen AG v. Haumtzollamt Itzehoe/ Zuckerfabrik Soest GmbH v. Haumptzollamt Paderborn*, [1991] ECR, p. I-415, at I-544 and the cases referred thereto.



The direct effect of regulations has no limit with regard of its effects on the different subjects of Community law. It can produce direct effects in the relationship between the individual and a Member State ("vertical") or just between individuals ("horizontal").

b) ***Directives And Decisions Addressed To Member States***

Arguments for the direct effect of the directives and decisions addressed to the Member States are less clear. There is an obvious difference in wording of Article 189 of the EEC Treaty between regulations on one side and directives and decisions on the other. This Article states that the directives are binding upon each Member State to which it is addressed as to the result to be achieved, but leave "to the national authorities the choice of form and methods" of implementing them. Some legal writers, for example Hartley, state that "there is a little doubt that the authors of the Treaties did not intend directives to be directly effective"[140]. The decisions, pursuant to the same Article, have no general application, but are binding in their entirety upon those to whom they are addressed. For the issue of direct effect, decisions addressed to the individuals are not problematic, because, they should, by their nature, be directly effective.

In fact the European Court ruled in the *Van Duyn Case* that, while regulations may by their very nature have direct effects, directives have no automatic direct effect[141].

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[140] Hartley, *op. cit., supra* note 9, p. 200.

[141] The *Van Duyn Case, op. cit.*, supra note 91, grounds, 12 and 13.

The Court, in fact, has not said that the directives have direct effect[142], but that they could produce similar effects as the regulations. Still, the European Court of Justice accepted that the directives can create rights for the individuals which can be enforced before a national court against a Member State, or more precisely that the "provisions in question are capable of producing direct effects in the legal relationships between the addressee of the act and third parties"[143]. This approach has not met the unanimous support of the supreme jurisdiction institutions of the Member States, and in fact, some tribunals, for example, French *Conseil d'Etat* in the *Cohn-Bendit* Case[144], refused to follow the Court's ruling on the direct effect of directives within national law. The Court itself, introduced the direct effect of the directives in a rather modest way. In the first two cases in which it has dealt with this issue, although ruling in favour of such an effect, the directives were analyzed in combination with one provision of the Treaty in the *SACE Case*[145] or in combination with one decision as in the *Grad Case*[146]. It is only in a the *Verbond Case*[147], that the Court accepted and declared the direct effect of one directive which was based upon

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[142] As it was noted by Pescatore, "The Doctrine of 'Direct Effect': An Infant Disease of Community Law", *European Law Review* 8 (1983), p. 155.

[143] Case 9/70, *Grad v. FZA Traunstein*, ECR [1970], p. 825.

[144] *Conseil d'Etat*, 22 December 1978, Dalloz 1979, p. 155; 1 CMLr (1980), p. 543.

[145] Case 330/70, *Sace v. Italian Ministry of Finance*, [1970]ECR, p. 1213.

[146] The *Grad Case, op. cit.*

[147] Case 51/76, *Verbond der Nederlandse Ondernemingen v. Inspecteur der Invoerrechten en Accijnzen,* [1977] ECR, p. 113.

an article of the Treaty which was not itself directly effective.

In order to explain its ruling, the ECJ stated as follows:

> "It would be incompatible with the binding effect attributed by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law."[148]

It is not the very nature of the act that can create those rights and the direct effect, but the fact that the Member State has not undertaken any action to fulfil the aims of a directive in question. In the *Johnston Case*, the ECJ explained this fact by saying that "in all cases in which a directive has been properly implemented its effect reach individuals through the implementing measures adopted by the Member State concerned"[149] The Court limited the value of the literal interpretation of the third paragraph of Article 189, which could have implied that the national authorities are free in their implementation of the objective of the directive. In this context, the ECJ has explained that even this Member State(s)' action has certain limits by stating that:

> "Although this provision leaves Member States the ways and means of ensuring that the directive is implemented, that freedom does not affect the obligation imposed on all the Member States to which the directive is addressed, to adopt, in their

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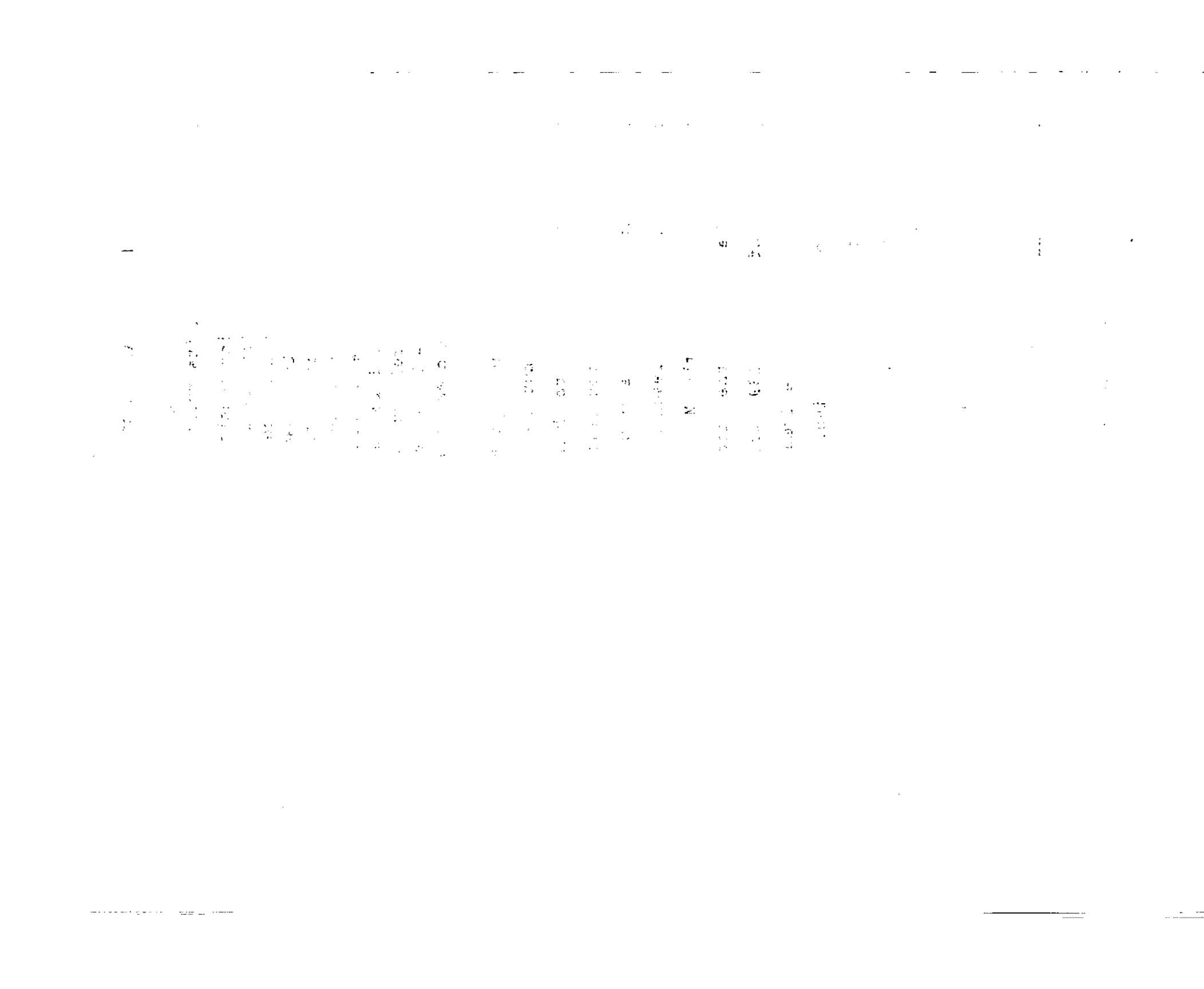
[148] The *Van Duyn Case, op.cit., supra* note 91, p. 1348, ground 12.

[149] The *Johnston Case, op. cit.*, at 1690, ground 51.



> national legal systems, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues"[150].

The ECJ explained its position in a more clear manner in the *Verbond Case*, asserting that the direct effect of directives is appropriate when "the individual invokes a provision of a directive before a national court in order to verify that the competent national authorities, in exercising the choice which is left to them as to the form and methods for implementing the directive, have kept within the limits as to their discretion set out in the directive"[151]

The Court emphasized two other arguments in favour of the direct effect of directives: first is its role of interpreter of Community legal acts pursuant to Article 177, where there is no difference similar to the one contained in Article 189. This argument was presented in the *Van Duyn Case*, but later abandoned in the *Verbond Case*. The argument of effectiveness presented in the quotation above, was already treated separately above in this text.

An argument not mentioned in the first cases, namely the principle of equity[152], was added in the later cases[153]. For example, in the *Marshall II Case*, the Court ruled that "a Member State which has not adopted the implementing measures required by the directive within the described period may not plead, as

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[150] The *Van Colson Case, op. cit.*, p. 1906, point 17.

[151] The *Verbond Case, op. cit.*, p. 127.

[152] *See* Hartley, *op. cit., supra* note 9, p. 203.

[153] For example Case 148/78, *Publico Ministero v. Ratti*, [1979] ECR, p. 113.

against individuals, its own failure to perform the obligations which the directive entails"[154].

The direct effect of directives is conditional by its nature. It depends on the quality of action in the implementation of a directive by the Member State, but once the time-limit for the implementation of directive expired, its effects will reach individuals in two possible situations: either by the national measures properly implementing the directive, or by the direct effects of directive itself. It is therefore linked to both the expiry of the time-limit[155] and (un)adequate implementation of a directive by a Member State. As the Court stated in the *Backer Case*, "wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied by an individual against the State where that State fails to implement the directive in national law by the end of the period prescribed or where it fails to implement the directive correctly"[156].

Basically the same arguments as for the directives, have been adopted by the ECJ to justify the direct effect of decisions. In the *Grad Case*, the Court concluded that "it would be incompatible with the binding effect attributed to decisions by Article 189 to exclude in principle the possibility that persons affected may invoke the obligation imposed by a decision".

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[154] The *Marshall Case, op., cit.*, p. 749, ground 47.

[155] The *Ratti Case, op. cit.*, p. 1629.

[156] The *Marshall Case, op. cit.*, p. 748, point 46. Already stated in the *Becker Case, op.cit., p.* 71, ground 25.

It is to be noted also that directive, for the time being, have only been held horizontally directly effective. The Court stated in the the *Marshall II Case* that

> "[w]ith regard to the argument that the directive may not be relied upon against an individual, it must be emphasized that according to Article 189 of the EEC Treaty the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to 'each Member State to which it is addressed'. It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person."[157]

4.3. GENERAL REQUIREMENTS FOR DIRECT EFFECT

The European Court has objectivized the criteria for direct effect of certain Community law provisions. To emphasize the difference of the subjective approach presented as the intention of contracting parties, the ECJ has used the expression "by its very nature"[158]. Except for regulations, this expression consists of several elements: the provision in question has to be clear, unconditional, not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law (does not require any legislative intervention on the part of the states)[159].

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[157] The Marshall Case, op. cit., at 749, ground 48. Confirmed by the *Maerlising Case*, at I-4160, ground 6.

[158] The *Van Gend & Loos Case, supra*, p. 13. *See* also cases *Ratti, Politi, Eunomia, Leonisio*, etc.

[159] In the *Van Gend & Loos Case, op. cit.*, at p. 13, the ECJ ruled that Article 12 of the EEC Treaty "contains a clear and unconditional prohibition which is not positive but negative

To those elements, the Court has added later just an element of no discretion (*"marge d'appréciation"*), which some legal writers consider as the essential one. In fact, already in the *Lütticke Case*[160] the ECJ took an important step in the development of the direct effect concept by declaring as directly effective one Treaty provision (Article 95, paragraphs 1 and 3) which imposed a duty of action on the Member States. In such a case, it is important that the implementation of the provision in question is not dependent on further measure which would suppose a discretion of the Member States, although some action of the Community institutions or the Member States could be envisaged[161].

Most scholars follow the classification of arguments presented by the European Court. In this context, the conditions for the direct effect given by Dashwood[162], Freestone and Davidson[163] as well as Hartley[164] could be mentioned.

As is possible to conclude from the case-law of the European Court, those conditions are not valuable for the provisions contained in all kinds of acts. As was noted above, it is

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obligation .. ." and that "[t]he implementation of Article 12 does not require any legislative intervention on the part of the States".

[160] Case 57/65, [1966] ECR, at 205.

[161] For example, in order to implement Article 59 of the EEC Treaty, all series of directives were envisaged. Case 33/74, *Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsverening voor de Metaalnijverheid*, [1974] ECR, p. 1299, at 1311, grounds 20-24.

[162] A. Dashwood, *op. cit. supra* note 13, p. 231.

[163] Freestone & Davidson, *op. cit., supra* note 13, p. 31.

[164] Hartley, *op. cit., supra* note 9, p. 188.

especially a case of regulations. For this reason, the conditions that are going to be presented are valid, in the first place, for the Treaty provisions, and to a certain extent to the directives and decisions addressed to the Member States.

Those conditions are not absolute but are required in addition to the Courts' specific interpretation of the different types of Community legal acts. Objective elements have to be implemented just in case that the Court has declared certain Community legal acts, as such, to have the possibility of containing provisions capable of producing a direct effect as was explained above[165]. It is only to the specific provision that the ECJ implements general conditions in order to establish its direct effect. But still, one should always take into consideration that every single condition, as established by the Court, could be implemented just in a specific context, and interpreted according to its scheme, system and wording. For this purpose, the objective of the legal act in question will very often determine all other conditions and the result of the interpretation can therefore be very much different to these that could have appeared from the literal analysis of the provision in question. This pattern can be the consequence of, *inter alia*, the dynamic character of the Community legal system and the fact that some wording and conditions could be differently interpreted in the different stages of development of the Community law.

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[165] Although it can be done by the ECJ in rather general manner. For example, in the Case 118/75, *Watson and Belmann*, [ECR] 1976, p. 1185, the ECJ ruled that all measures adopted by the Community within the application of Articles 48 to 66 of the EEC Treaty are directly effective, Hartley, *op. cit., supra* note 9, p. 207, footnote 71.

Finally, as was already mentioned, the provision in question is not necessarily to be interpreted in isolation. Very often the ECJ analyses the provision within the framework of other related provisions, both contained in the same act or in different acts. For example, in the *Copolongo Case*, the European Court stated that "[f]or the purpose of interpretation, the first paragraph of Article 92 cannot be regarded in isolation, but must be considered within the framework of the scheme of Articles 91 to 94"[166].

a) ***Clear And Unambiguous Provisions***

That is *conditio sine qua non* of the direct effect of the specific provision. It can be understood as a general requirement for any legal norm, and therefore not characteristic to the Community legal order. Freestone and Davidson explain that "[t]his means that the obligation must be formulated in such a way that it is capable of being applied with precision"[167]. The ECJ obviously does not consider that clarity results from the simple wording of the provision and avoids to analyze the provision in isolation. That is probably the reason that Parry and Dinnage concluded that the clarity "relates not merely to the straightforwardness of the wording, but in particular to an obligation which is identifiable and recognizable"[168].

To support such an opinion it can be noted that the European

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[166] Case 77/72, *Carmine Capolongo v. Azienda Agricola Maya*, [1973] ECR, p. 611, at p. 621, ground 5.

[167] Freestone and Davidson, *op. cit., supra* note 13, p. 31.

[168] Anthony Parry and James Dinnage, *Parry and Hardy: EEC Law*, (London: Sweet & Maxwell, 1981), p. 96.

Court has declared on several occasions a provision as being directly effective in spite of the fact that it had to clarify further its wording. The decisive moment for this approach is the context of the provision, either in the scheme of the Community or of the time of a judgment. As Hartley explains:

> "clarity and unambiguity are striven for by every legal draftsman; frequently however, they are not attained. This is partly true in the case of instruments which have to be agreed to by a number of different parties with conflicting interests, as is the case both with the constitutive Treaties and Community legislation. Like many provisions of national law, Community law is often unclear and ambiguous. This does not in itself, however, prevent its being directly effective: the European Court is there to interpret it and once this has been done the ambiguities will be resolved"[169].

Generally speaking, the provision in question has to be precise enough to be suitable for application by a court of law. It is apparent that the interpretative approach of the European Court would have never requested an absolute precision in wording. Rather, clarity is to be expressed in the combination of wording and the context of a provision in question. For this purpose, the European Court has often analyzed few provisions together and/or their relations to the general objectives of the act, policy or measure to be achieved. It has given even to the notion of clarity a dimension of dynamics. Clarity can be established also by the pertinent jurisprudence of the ECJ. By its jurisprudence, the Court has precized some expressions, and when the question of direct effect had to be analyzed, the provision could be defined as clear, although it would have been such before the

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[169] Hartley, *op. cit.*, *supra* note 9, p. 189.

European Court's explanation[170].

b) ***Unconditional Provisions***

Advocate-General Mayras summarized the conditions for the unconditionality of a provision, in the *Van Duyn Case* as "in other words, subject to no limitation; if however, a provision is subject to certain limitations, their nature and estent [sic]] must be exactly defined"[171].

Hartley explains that it means that "the right must not be dependent on something within the control of some independent authority, such as a Community institution or a Member State itself"[172]. Van Gerven gives more detailed definition by stating that complete and unconditional provision

> "means that its fulfilment is *not* conditioned by the expiration of a time period and not made dependent on (as opposed to: only facilitated by) an intervention on the part of the Community institutions or the national authorities which implies a freedom of action to make one of at least two alternative decisions. An intervention merely consisting in the interpretation of loose concepts or in the defemination of scope of exceptions to the obligation concerned, is not an intervention implying a freedom of action, and therefore is no bar to direct effect"[173]

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[170] See examples given by Albert Blackmann, "L'applicabilité directe du droit communautaire", in *Les recours des individus devant les instances nationales en cas de violation du droit international* (Bruxelles, 1978), pp. 98-99.
In the *Verbond Case*, the ECJ even refers to the ordinary meaning of the term.

[171] The *Van Duyn Case*, *op. cit.*, *supra* note 91, p. 1354.

[172] Hartley, *op. cit.*, *supra* note 9, p. 191.

[173] Walter van Gaven, *op. cit*, *supra* note 136, at 7.

At the beginning of the ECJ's jurisprudence, conditional character was related to the transitional period of the Treaty[174]. After the expiry of this period, a provision can become unconditional. A provision can also be conditioned by an objective reserve, as for example an adoption of the further measures[175] and that is the most frequent reason for denying the direct effect of the provision. But even in such a case, the ECJ stated that if a provision imposes a well defined obligation, its fulfilment cannot be delayed or jeopardized by the absence of provisions which were to be adopted for its implementation[176]

c) ***No Further Action Required***

It must be noted that this requirement was introduced already in the *Van Gend & Loos Case*[177]. As it was related to an interdiction of action of Member States, it had its *raison d'être*. It is close to the requirement of unconditional character and the activity of the Member State should be limited to legislative, thus not including normal juridical interpretation. In the *Capolongo Case*, in analysing Article 92(1) of the EEC Treaty, the European Court concluded that "the provisions of Article 92(1) are intended to take effect in the legal systems of Member States, so that they may be invoked before national courts, where they have been put

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[174] The *Lütticke Case*.

[175] The *Capolongo Case*, p. 622, ground 6.

[176] The *Van Binsbergen Case, op. cit., supra* note 161, pp. 1311-1312.

[177] In this Case, the ECJ requested just absence of requested action of the Member States. In the later cases, the ECJ added to this requirement also an absence of the action of Community institutions.

in concrete form by acts having general application provided for by Article 94 or by decisions in particular cases envisaged by Article 93(2)"[178] With its later case-law, the European Court itself relativized this requirement. As it was noted by Hartley, "in accordance with its general policy, however, the European Court has sought to whittle this requirement down to its very minimum"[179]. As it was indicated, in some cases, the European Court declared some provisions of the EEC Treaty requiring action of the Member State as having the direct effect. A most characteristic example is the one of the effect of directives, which was discussed above.

The crucial criteria for evaluating whether the further action represents an obstacle for the direct effect could be analyzed in the terms of discretion in executing or implementing the provision in question that was left to the Member States or the Community institution in the adoption of further measures[180]. In the *Van Duyn Case*, the ECJ accepted the reasoning of the Advocate General Mayras that "Member States must not be left any real discretion with regard to the application of the rule in question"[181] and concluded that "these provisions [of Article 48 (1) and (2) of the EEC Treaty] impose on Member States a precise obligation which does not require the adoption of any further measure on the part either of the Community institutions or of the Member States and *which leaves them, in relation to its*

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[178] The *Capolongo Case, op. cit.*,pp. 621-622, ground 6.

[179] Hartley, *op. cit., supra* note 9, p. 194.

[180] The Member States considered discretion as one of the arguments against the direct effect. *See* positions of the German and French Governments in the *Becker Case*.

[181] *Op. cit., supra* note 91, p. 1354.

implementation, no discretionary power"[182]. In the *Becker Case*, the ECJ went further stating that even if the directive in question "undoubtedly confers upon the Member States varying degrees of discretion as regards implementing certain of its provisions, individuals may not for that reason be denied the right to rely on any provisions which owing to their particular subject-matter are capable of being severed from the general body of provisions and applied separately"[183]. This discretion thus requires very often a serious judicial analysis of all the circumstances involved.

5. DIRECT EFFECT OF THE COMMUNITY LAW *LATO SENSU*

The ECJ has had the possibility to deal with the question of the direct effect of international agreements on several occasions. In its jurisprudence, the ECJ has encountered different situations which could have influenced its method of interpretation.

For example, the interpretation given in the form of a preliminary ruling could deal with the validity of Community act (for example the *International Fruit Company, Schroeder*[184], *Schlüter, Haegeman, Nederlandse Spoorwegen* cases) or of national provision for example the *Pabst, Kupferberg, Demirel* cases). Also the issue could be raised in the context of different types of

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[182] *Ibid*, p. 1347, ground 6 (emphases added).

[183] The *Becker Case, op. cit.*, p. 72, ground 29.

[184] Case 40/72, *I. Schroeder KG v. the Federal Republic of Germany*, [1973] ECR, p. 125.

Community international agreements[185], as for example GATT (for example the *International Fruit Company, Schlüter, Nederlandse Spoorwegen* and *Fediol*[186] cases), various association agreements (for example the *Haegeman, Schroeder, Demirel, Bresciani, Pabst, Sevince* cases) or free-trade/cooperation agreements (for example the *Polydor, Kupferberg, Kziber* and *Yousfi* cases).

Also, the merit of a case could concern the relations between an individual and a Member State (vertical direct effect - for example in the *Demirel Case*) or between two individuals (horizontal direct effect - for example in the *Polydor Case*). Furthermore, the agreements involved could fall within the exclusive competence of the Community or being concluded in the form of "mixed agreements". In its case-law, the ECJ attached importance to some, but not to all these specific circumstances. In the following text we will try to analyze to what extent those different elements have influenced the consideration of the ECJ.

In fact, as was concluded by Hartley[187], the very idea of the direct effect of international agreements has been inspired by the idea of effectiveness. While international agreement is binding on the Member States pursuant to Article 228 of the EEC Treaty, an action under Article 169 could be envisaged in a case of non-implementation. But again, the direct effect of international agreements emphasizes the role of individuals in

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[185] For an attempt at classification *see*, e.g., Edmond L.M. Völker, "Direct Effects of International Agreements", *Legal Issues of European Integration* 1983/1, pp. 131, at 131-132.

[186] Cases 187/85 and 188/85, *EEC Seed Crushers's and Oil Processors' Federation (Fediol) v. Commission of the European Communities*, [1988] ECR, p. 4155 and p. 4193.

[187] *Op. cit., supra* note 21, p. 214.

the control of the implementation of a Community provision by the Member States, even in a case of international agreements. This fact had an influence on the reasoning of the ECJ, and its neglecting of some elements for its considerations in one case, although they had been applied in the others.

5.1. PLACE OF AGREEMENTS IN THE COMMUNITY LEGAL SYSTEM

First of all, it was important to define the place of agreements within the Community legal system. The general formula used by the ECJ was that international agreements made by the Community "form an integral part of the Community legal system"[188]. This far-reaching point has placed the interpretation of agreements in the competence of the ECJ and influenced the possibility of interpretation of its norms in a manner more similar to that inherent on the rest of the Community legal system. As a consequence, as in the case of the Community law *stricto sensu*, the effect in the Community of such agreements is subject to interpretation of Community law, and not of the national legal order of Member States.

But, such an approach has never answered the question how an agreement in question becomes a part of the Community legal order. The ECJ never attached any importance to the form of act concluding agreement on behalf of the Community. This fact implicitly indicated that the international law norms were not transformed into Community norms by means of the concluding act[189]. Most scholars have drawn a conclusion from that fact that

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[188] For the first time mentioned in the *Haegeman Case, op. cit.*, at 460, ground 6; and later repeated constantly.

the ECJ acceted the monist approach in the relation between international and the Community law[190].

This expression does not either define the possible effects of agreements in the Community and national legal systems. Being part of the Community legal order does not necessarily mean having direct effect, i.e., conferring rights on individuals. In fact, the EEC Treaty contains only a laconic formulation in its Article 228 that an international agreement concluded by the Community is binding on the Community institutions and Member States, without making any references on the possible effects on individuals. Furthermore, even the fact that the ECJ has interpreted, in most of the cases, an agreement under Article 177, does not imply the agreement's direct effect, because the competence of Article 177 does not limit the ECJ to interpret only the directly effective rules.

The declaration that an international agreement binding on the Community forms part of the Community law does not answer automatically the question about its place in the hierarchy of this system of law. In doctrine there is no doubt that the international agreements are a source of Community law, and they are often placed between primary and secondary legislation[191]. The ECJ itself implicitly concluded in the *International Fruit*

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[189] *See* arguments presented by the firm Polydor in the *Polydor Case*, *op. cit.*, p. 339.

[190] *See*, Louis, *op. cit.*, *supra* note 53, 109, p. 136-137 and 140.

[191] *See*, e.g., Louis, *op. cit.*, *supra* note 53, 109, at 138-139; Jean-Paul Pietri, "La valeur juridique des accords liant la Communauté économique européenne", *RTDE*, 1976, pp. 194-214, at 199-203.

Company Case that international agreements have to be in accordance with the founding treaties, but prevail over the Community secondary legislation.

5.2. MAIN ELEMENTS FOR THE ANALYSIS OF THE DIRECT EFFECT OF INTERNATIONAL AGREEMENTS

The ECJ first had to admit the possibility to extend the theory of direct effect to the Community law *lato sensu*. In the first case in which the Court dealt with the question of direct effect of the international agreements, the *International Fruit Company*, although not recognizing the direct effect of the GATT, the Court did not exclude the possibility that an international agreement of the European Community could produce direct effect. By the mere fact of entering into this issue and analyzing the capability of GATT to confer rights on individuals, the ECJ established some guiding principles and basis of its approach to the direct effect of the international agreements. This fact represents a very important point for the ECJ's further jurisprudence.

But contrary to the Community law *stricto sensu*, the international agreement concluded by the Community cannot and has not been interpreted by the Court as a separate legal category. While, as it is presented above, the Treaties, regulations, directives and decisions have been interpreted by the Court in a preliminary way, as the legal acts capable of containing the provisions which produce direct effects (further submitted to the objective requirements), in the case of the international agreements, the European Court has not adopted the same attitude. As the Community has the capacity of concluding different types

of international agreements (free-trade, association, cooperation etc.), the Court has never given a general formula of their possible effects as such, but has decided to analyze each agreement separately: from case to case. That means that before the provision in question is analyzed, the Court always has to establish the fact that the agreement in question (and not certain categories of agreements) could create the system capable of producing direct effects "in the light of both the object and purpose of the Agreement and its wording"[192]. In the *International Fruit Company Case*, the ECJ did not even enter into examination of the specific characteristics of the provisions in question (Article XI of GATT), but has, after analysis of the general system of GATT, declared that, "when examined in such a context", this provision "is not capable of conferring on citizens of the Community rights which they can invoke before the courts"[193]. The same attitude the ECJ adopted in the *Schlüter Case* as regards Article II of the GATT.

a) ***Object And Purpose***

As for the objects and purpose of the agreement, the ECJ used the elements of analysis similar to those presented in the *Van Gend & Loos Case*. The European Court tends to analyze first of all specific objectives of the international agreement in question, as well as its institutional structure[194]. The starting point for

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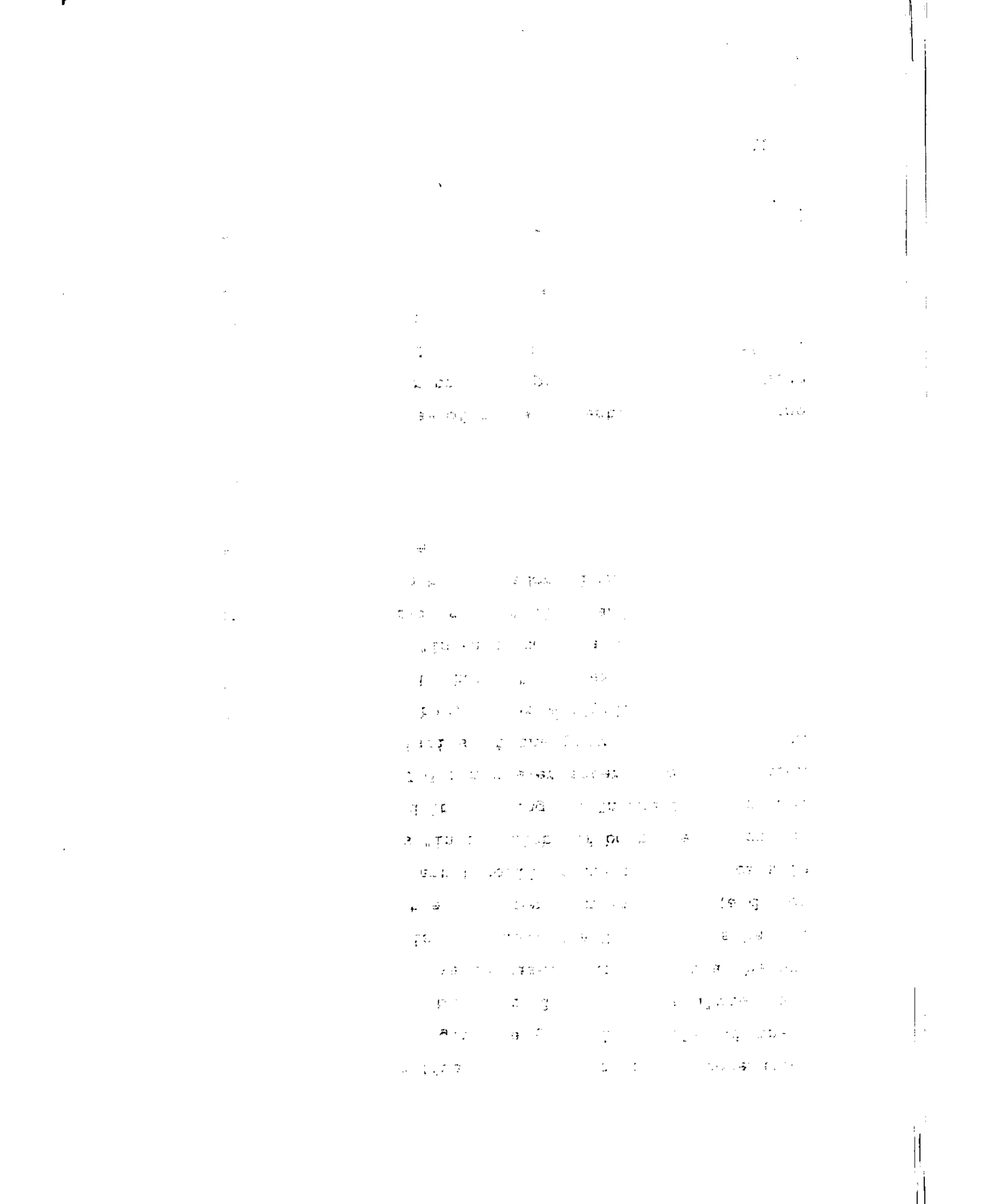
[192] The *Polydor Case*, *op. cit.*, p. 346, ground 8. In the *Kupferberg Case*, the European Court used the expression "context" instead of wording", *op. cit.*, p. 3665, ground 23.

[193] The *International Fruit Company Case*, *op. cit.*, p. 1228, ground 27.

[194] Tagaras stated that in fact the use of this pre-condition is the same for entire Community law, *see*, Haris N. Tagaras,



such an analysis and comparison is explicit reference to the provision of the agreement in question and its comparison with the EEC Treaty. Of course it is very difficult to find an agreement providing similar structure and objectives as the EEC Treaty, but it seems that this was the approach of some states, and in fact, the Court often invoked exactly those arguments[195]. By this method, the European Court has arrived to the different results.

AA) *GATT*

The first international agreement under the consideration of the ECJ was GATT[196]. In the *International Fruit Company Case*, the ECJ declared that the GATT cannot contain provisions capable of producing direct effects. This position of the ECJ has been confirmed in several later judgments as, for example Schlüter or three judgments from 1983[197]. The European Court excluded the

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"L'effet direct des accords internationaux de la Communauté", pp. 15-53.

[195] *See* arguments given by the States and the Commission in the *Kupferberg Case*, *op. cit.*, pp. 3650-3651, and the fact that in *Kupferberg* the Court did not refer to those arguments as in the cases concerning the GATT analysis.

[196] On this issue there is extensive literature, as for example Paul J.G. Kapteyn, "The 'Domestic' Law Effect of Rules of International Law within the European Community System of Law and the Question of the Self-Executing Character of GATT Rules", 8 *International Lawyer* 1, p. 74-82; Fernando Castillo de la Torre, "The Status of GATT in EEC Law: Some New Developments", 26 *Journal of World Trade* 5, 1992, pp. 35-43; Ernst-Urlich Petersmann, "Application of GATT by the Court of Justice of the European Communities", 20 *CMLr* (1983), pp. 397-437; J. Steenbergen, "The Status of GATT in Community Law", 15 *Journal of World Trade Law* (1981), pp. 337-344.

[197] Case No. 266/81, *Società Italiana per l'Oleodotto Transalpino (SIOT) v. Ministero delle Finanze*, Ministero della

possibility of direct effect of the GATT provision basically because of its structural weakness, and more specifically, as the Court explained the arguments in its *SPI* ruling:

> "The Court reached the conclusion on the basis of considerations concerning the general scheme of GATT, namely that it was based on the principle of negotiations undertaken on a reciprocal and mutually advantageous basis and was characterized by the great flexibility of its provisions, in particular those concerning the possibilities of derogation, the measures which might be taken in cases of exceptional difficulty and the settlement of differences between the contracting parties"[198].

BB) *Association Agreements*

The ECJ had also to deal with different types of association agreements[199], as in the cases of *Bresciani, Haegeman, Demirel, Schroeder, Razanatsimba*[200], *Pabst, Kus and Anastasiou.*

Marina Mercantile, *Circoscrizione doganale di Trieste and Ente Autonomo del Porte di Trieste* , [1983] ECR, 731; Joined Cases 267-269/81, *Amministrazione dello Stato v. Società Petrolifera Italian (SPI) and SpA Michelin Italiana (SAMI)*, [1983] ECR, 801; Joined Cases 290-2191/81, *Compagnia Singer SpA and Geigy SpA v. Amministrazione delle Finanze dello Stato* [1983] ECR, 847.

[198] The *SPI Case, ibid,* p. 830, ground 23.

[199] The Advocate General Mayras explained in the *Haegeman Case* that "it follows that such a type of agreements [association agreements] may lead to the establishment of very close institutional cooperation between the Community and the associated country without however going so far as the unconditional accession of that country. Convesely an agreement of this nature may be limited either to the grant of non-discriminatory advantages, the establishment of a free trade area, a customs union or even the establishment of a true preferential system.", *op. cit.*, p. 1023.

[200] Case 65-77, *Jean Razanatsimba,* [1977] ECR, p. 2229.

In the *Pabst Case* the ECJ found the Association Agreement between the Community and Greece as capable of containing provisions having direct effect. The ECJ emphasized that the Association Agreement contains the provisions "the purpose of which was to prepare for the entry of Greece into the Community... by measures for the gradual adjustment to requirements of Community law"[201]. The ECJ emphasized, in this context, the existence of provisions aimed at establishment of customs union, harmonization of agricultural policies and introduction of freedom of movement for workers. It seems that this objective of the Agreement made unnecessary any consideration of the institutional structure, derogation clauses or any consideration similar to those presented in the analysis of the GATT, because the ECJ did not even mention them in its ruling. The same attitude was adopted by the Commission during the written procedure[202]. On the contrary, the Advocate-General Mrs. Rozés, analyzed in detail institutions established by the Agreements as for example the Council of Association and referred to the argument of reciprocity[203], all of which was ignored by the Court. It should be noted, however, that the ECJ was not so impressed by the Association Agreement with Greece in the *Haegeman case* when it found three important reservations to the achievement of the customs union to be created by the Agreement[204], and defined the objective of the Agreement in a more moderate manner[205].

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[201] The *Pabst Case*, *op. cit.*, p. 1350, ground 26.

[202] The *Pabst Case*, *ibid*, p. 1342.

[203] *See*, the *Pabst Case*, considerations at pp. 1358-1360.

[204] The *Haegeman Case*, *op. cit.*, p. 4612, ground 17.

[205] *Op. cit.*, p. 469, ground 11; Although the Advocate General Mayras mentioned "only a limited institutional content"

Another association agreement the ECJ was dealing with was the Association Agreement with Turkey, in the *Demirel, Sevince* and *Kus* cases. In the *Demirel Case*, the ECJ pointed out that "the Agreement provides for a preparatory stage to enable Turkey to strengthen its economy with aid from the Community, a transitional stage for the progressive establishment of a customs union and for the alignment of economic policies, and a final stage based on the customs union and entailing closer coordination of economic policies"[206]. It is obvious that the ECJ considers the Association Agreement with Turkey, although concluded in the same form as the one with Greece, as less ambitious. It is doubtful whether the fact that the ECJ admitted the possibility of direct effect of the Agreement with Greece after this country had become the Member State of the Community has influenced its reasoning. Obviously such a consideration has never existed for Turkey. To the arguments of limited purposes of the Agreement with Turkey, the ECJ added arguments of the modest role of the Council of Association established by the Agreement, as well as limited scope of Articles 12 of the Agreement and 36 of the Protocol, to conclude that "they essentially serve to set out a programme and are not sufficiently precise and unconditional to be capable of governing directly the movement of workers"[207].

In the *Anastasiou* case it was a question about the direct effect

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of the Agreement, he emphasized that the negotiators, "as shown by certain provisions of the agreement", had in mind accession of Greece to the Community as a future objective. *See ibid*, p. 1023.

[206] The *Demirel Case, op. cit.*, p. 3752, ground 15; confirmed by the *Sevince Case, op. cit.*, p. I-3502-3503, ground 20.

[207] The *Demirel Case, op. cit.*, p. 3753, ground 23.

of relevant provisions of the 1977 Protocol to the Association Agreement concluded between Cyprus and the Community. Analyzing this agreement, the ECJ pointed out that "the aim of the Association Agreement is the progressive elimination of obstacles to trade between the Community and Cyprus"[208], in order to declare the provision of the Protocol as having direct effect.

Specific example of association agreements are those with overseas countries and territories, concluded pursuant to Articles 131-136[209] of the EEC Treaty. The *Bresciani Case* dealt with the Yaoundé Convention. The Court ruled in favour of the direct effect of one agreement's provision, but only after confirming "a special nature of the Convention" aimed to promote the development of the Associated States.[210] After such a conclusion, the ECJ did not feel obliged any more to analyze an institutional structure of the Convention.

In the *Razanatsibma Case*, the ECJ proceeded directly to the analysis of the Article 62 of the Lomé Convention and measures of non-discrimination (and declared that it could not be directly applicable to confer the rights in the subject-matter), without preliminary considerations about the nature and objectives of the Convention. It should be noted however that both the Commission and the Advocate General paid more attention to this question than the ECJ.

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[208] The *Anastasiou Case, op. cit.*, p. I-3128, ground 24.

[209] The Maastricht Treaty added to these articles Article 136A concerning Greenland.

[210] The *Bresciani Case, op. cit.*, grounds 22 and 23, p. 141.

CC) *Free Trade and Cooperation Agreements*

Finally the Court has to deal also with the free-trade agreements of the Community. That was the situation in the *Polydor Case* in which the Court analyzed the 1972 Agreement between the Community and Portugal. First of all, the ECJ analyzed the purpose of the Agreement according to its preamble and especially the intention of the contracting parties to establish a free-trade area. The ECJ compared inevitably the Portugal Agreement with the EEC Treaty and declared that "it does not have the same purpose as the EEC Treaty" because "the instruments which the Community has at its disposal in order to achieve the uniform application of Community law and the progressive abolition of legislative disparities within the common market have no equivalent in the context of the relations between the Community and Portugal"[211].

With a similar situation the ECJ dealt in the *Kziber Case*, in which the Belgian *Cour de travail* from Liège sought an interpretation of the 1976 Cooperation Agreement between the EEC and Morocco. The ECJ explained that the objective of the Agreement was "to promote overall cooperation between the Contracting Parties with a view to contributing to the economic and social development of Morocco and helping to strengthen relations between the Parties"[212]. The ECJ expressly stated that the Agreement did not refer to Morocco's association with or future accession to the Communities[213]. But this fact did not prevent the ECJ from pointing out that the provisions relating

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[211] The *Polydor Case, op. cit.*, p. 349, grounds 18 and 20.

[212] The *Kziber Case, op. cit.*, p. I-224, ground 9.

[213] The *Kziber Case, op. cit.*, p. I-226, ground 21.

to cooperation in the field of labour were far from being purely programmatic in nature but established a principle capable of governing the legal situation of individuals[214]. In such circumstances, the ECJ found that the provision in question was capable of being applied directly.[215] Basically the same arguments were repeated, this time for social security, in the *Yousfi Case*[216].

In the *Kupferberg Case* the Court found the 1972 Portugal Agreement was capable of containing provision having direct effect, in spite of strong opposition of the Member States and the Commission[217]. As the structure of the Portugal Agreement does not differ much from the GATT, and "at any rate it is much closer to the structure of the GATT than to that of the EEC Treaty"[218], obviously some other considerations have been taken into account by the European Court[219]. The Court indeed concluded that similar provisions contained in both the EEC Treaty and the Portugal Agreement need distinction of their interpretation which

> "is all the more necessary inasmuch as the instruments which the Community has at its disposal in order to achieve the uniform application of Community law and the progressive abolition of legislative disparities within the common market have no equivalent in the context of relations between the Community and

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[214] The *Kziber Case, op. cit.*, p. I-226, ground 22.

[215] *Ibid*, p. I-227, ground 23.

[216] Although the German Government requested the ECJ to reconsider its case-law.

[217] *See* pp. 3651-3653.

[218] Bourgeois, *op. cit., supra* note 20, p. 1267.

[219] See argument given by Bourgeois, op. cit. supra note 20, p. 1267.

Portugal"[220].

The ECJ made its conclusions on the general capability of the Portugal Agreements to contain provisions having direct effect, after having considered specifically the institutional structure and safeguard clauses of the Agreement, the same as in the *International Fruit Company*.

Finally, in the *Opinion 1/91*, the European Court of Justice dealt with the EEA Agreement, although not in the context of article 177. In this respect, the Court made a comparison between the objective of the EEC Treaty and the EEA Agreement. Declaring those two international instruments as different, the European Court explained the basic difference emphasizing that the objectives of those two international instruments are not identical, especially regarding the rules of trade and competition[221] The European Court explained the major difference by defining the EEC Treaty as "the constitutional charter of a Community based on the rule of law", characterized by the Community law's "primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves"[222] and in contrast, "[t]he EEA is to be established on the basis of an international treaty which, essentially, merely creates rights and obligations as between the Contracting Parties and provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up"[223]. On the basis

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[220] *Op. cit.*, p. 329, ground 16.

[221] *Opinion 1/91, op. cit.*, grounds 15-18.

[222] *Ibid*, p. I-6102, point 21.

[223] *Opinion 1/91, op. cit.*, ground 20.

of those considerations, the European Court of Justice concluded that "homogenity of the rules of law throughout the EEA is not secured by the fact that the provisions of Community law and those of the corresponding provisions of the agreement are identical in their content or wording"[224].

b) ***Wording of Agreement***

The wording of an agreement, as was indicated above, has to be interpreted within the context of the agreement itself. This approach had for its result that even in a case where the wording of international agreement reproduces a wording of a provision in the EEC Treaty, the result of its interpretation in a different context is not the same[225]. As the European Court explains in the Opinion 1/91, "[t]he fact that the provisions of the Agreement and the corresponding Community provisions are identically worded does not mean that they must necessarily be interpreted identically. An international treaty is to be interpreted not only on the basis of its wording, but also in the light of its objectives"[226].

That is a general rule although sometimes, as in the *Bresciani Case*, the ECJ concluded that "by expressly referring, in Article 2 (1) of the [Yaoundé] Convention, to Article 13 of the [EEC] Treaty, the Community undertook precisely the same obligation

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[224] *Ibid*, point 22, p. I-6103.

[225] *See* the *Polydor case*, *op. cit.*, p. 348, ground 15: "such similarity of terms is not sufficient reason for transposing to the provisions of the Agreement the above mentioned case-law..."; See also Case 225/78, *Procureur de la République Besançon v. Bouhelier*, [1979], p. 3151, at 3160.

[226] *Opinion 1/91*, *op. cit.*, p. I-6101, point 14.

towards the Associated States to abolish charges having equivalent effect as, in the Treaty, the Member States assumed towards each other. Since this obligation is specific and not subject to any implied or express reservation on the part of the Community, it is capable of conferring on those subject to Community law the right to rely on it before the courts ..."[227]. In a similar manner, dealing with the question of the effects of the direct applicability of Article 53(1) of the Association Agreement with Greece in the *Pabst Case*, the ECJ stated that that provisions, "the wording of which is similar to that of Article 95 of the Treaty, fulfils, within the framework of the Association between the Community and Greece, the same function as that of Article 95"[228] Without further analysis of the provision of the Agreement, but following the analysis of Article 95 of the Treaty and even referring to its earlier jurisprudence on this Article, the ECJ concluded that Article 53(1)contained a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure, and thus was directly applicable after expiry of the time-limit envisaged by the Agreement.

c) ***Argument of Reciprocity***

The fact of international agreements and their origin not depending exclusively on the Community law nature, introduced

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[227] The *Bresciani Case, op. cit.*, p. 141-142, ground 25. In the next paragraph,(26), the European Court made it clear that it relates to the Community citizens.

[228] The *Pabst Case, op. cit.*, p. 1350, ground 26.

another element in the European Court's considerations, namely that of reciprocity. While within the Community law, non-implementation of the Community provision by one Member State cannot have as a consequence non-implementation of the same provision by other Member State(s)[229], and consequently invocation of the reciprocity arguments, the situation with the international agreements is different. The principle of reciprocity is one of the principles of general international law[230], and the European Court has taken this fact into consideration. It has to be noted that this argument was raised in the *Bresciani*, *Polydor* and *Kupferberg* cases. The Court has not accepted this argument, but stated in the *Kupferberg Case* that

> "The fact that the courts of one of the parties consider that certain of the stipulations in the agreement are of direct application whereas the court of the other party do not recognize such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement"[231]

Although in this particular case the European Court has not admitted the argument of reciprocity, even the fact that it entered in the Court's considerations indicates that the European Court is open to the reciprocity argument. As Bourgeois concluded: "In Kupferberg, the Court of Justice seems to imply that, where such absence [of reciprocity] could be established,

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[229] *See*, e.g., opinion of the ECJ of 13 November 1964 in the Case 90-91/93, *Luxembourg v. Belgium*, ECR [1964]. Bebr calls it a principle of solidarity, *see*, Bebr, *op. cit.*, *supra* note 12, p. 71.

[230] "According to classical international law in the absence of reciprocity any agreement is null and void, because the international legal system is based on the sovereign equality of states.", E.L.M. Völker, *op. cit.*, *supra* note 185, p. 136.

[231] The *Kupferberg Case*, *op. cit.*, p. 3664, ground 18.

the Court would take this into account in deciding whether an individual should be able to enforce the agreement in question".[232]

In the *Bresciani Case*, the European Court dealt again with the argument of reciprocity. After having stated that "the [Yaoundé] Convention was not concluded in order to ensure equality in the obligation which the Community assumes with regard to the Associated States, but in order to promote their development ...", the Court ruled that "[t]his imbalance between the obligations assumed by the Community towards the Associated states, *which is inherent in the special nature of the Convention*, does not prevent recognition by the Community that some of its provisions have a direct effect"[233].

The fact of the existence of this argument in the ECJ's considerations, and those of Member States and other Community institutions, indicates that the ECJ is ready to include some elements of the international law in its interpretative methods, the elements that are not inherent to the Community legal system. The ECJ has been very careful in introducing the argument of reciprocity for the time being, but in times to come it will probably have to define in more detail to what extent this argument is admissible in the ECJ's interpretation of the international agreements.

d) ***General Requirements For Direct Effect***

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[232] Bourgeois, *op. cit., supra* note 20, p. 1265.

[233] The *Bresciani Case*, *op. cit.*, p. 141, grounds 22 and 23, emphases added.

The case-law of the European Court does not give us enough indications of whether the Court has maintained its requirements for the specific provisions having direct effect the same in the case of international agreements as for the Community law *stricto sensu*[234]. The Commission emphasized constantly that the concept of direct effect cannot be transposed automatically to international agreements[235], but it is still doubtful to what extent the ECJ applies its own criteria simply transposed to the international agreement. In the *Pabst Case*, the Advocate-General Mrs. Rozés, repeated the general condition from the *Lütticke Case* as applicable to the international agreements[236].

The only sure indication that flows from the case-law is that the analysis of the specific provision takes place only once the issue of the nature of the agreement is resolved. This element has been more emphasized than in Community law *stricto sensu*. In the *Kupferberg Case*, it is only after declaring that the purpose of the Portugal Agreement is to create a system of free trade and that it provides for elimination of rules restricting commerce in virtually all trade, that the European Court found that "[t]he first paragraph of article 21 of the Agreement between the Community and Portugal is directly applicable and capable of conferring on individual traders rights which the courts must protect"[237]. In other cases, if the nature of agreement is found by the ECJ not to satisfy its requirements for the direct effect,

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[234] See for example ground 25 of the *Anastasiou Case* "clear, precise and unconditional obligation".

[235] For example in the *Polydor Case, op. cit.*, p. 341, later accepted by the ECJ.

[236] The *Pabst Case, op. cit.*, p. 1358.

[237] The *Kupferberg Case, op. cit.*, p. 3670.

the analysis of the specific provision does not occur.

The Commission even proposed to differentiate between provisions of international agreement and that the ECJ should give the direct effect only to the "hard core" provisions, in the analogy to the ECJ's arguments in the *Defrenne* Case[238].

As for the specific criteria, the ECJ basically repeated the same requirements as for the Community law stricto sensu. In the *Demirel Case*, for example, the ECJ stated that an international agreement must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure"[239].

Even when the Court repeats the same requirements they do not mean necessarily the same thing[240]. While in the Community law *stricto sensu*, the Court's interpretation depends on the various other interpretations, even the same worded provisions of

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[238] "On the basis of that distinction the Commission arrives at the conclusion first that Article 14 of the Agreement with Portugal has no direct effect, except perhaps its hard core...", The *Polydor Case, op. cit.*, p. 343-344.

[239] Ground 14. Repeated in the *Sevince Case, op. cit.*, p. I-3502, ground 15; and in the *Anastasiou Case, op. cit.*, at I-3127, ground 23; The *Kziber Case, op. cit.*, p. I-225, ground 15;

[240] The Commission expressed its opinion that "[i]t is not possible, in assessing the direct effect of this provision [Article II of GATT], to apply the criteria which have been developed in respect of the direct applicability of Community law just as they stand, such, for example as the absence of enforcement measures to be taken by national authorities", the *Schlüter Case, op. cit.*, p. 1144.

international agreement do not have to be in the same manner unconditional and clear. The provision in question should be interpreted in the light of both the objective purpose and the wording of the international agreement itself, and not pertinent interpretation of the EEC provisions. The ECJ was clear in the *Polydor Case* by stating that

> "[t]he considerations which led to that interpretation of articles 30 to 36 of the Treaty do not apply in the context of the relations between the Community and Portugal as defined by the Agreement. It is apparent from an examination of the Agreement that although it makes provision for the unconditional abolition of certain restrictions on trade between the Community and Portugal... it does not have the same purpose as the EEC Treaty, insomuch as the latter... seeks to create a single market reproducing as closely as possible the conditions of a domestic market"[241].

The ECJ also indicated, in the *Sevince* and *Kziber* cases, that in order to determine if the provision in question satisfies the specific criteria "it is necessary in the first place to examine the terms of that provision"[242].

In the *Demirel Case*, the ECJ concluded that Article 7 of the Association Agreement with Turkey provides obligation of the parties in "very general terms"[243], which was enough to declare it as not directly applicable in the internal legal order of the Member States. On the contrary, in the *Kziber Case*, the ECJ declared Article 41(1) of the Cooperation Agreement with Morocco as being directly effective because it found this provision as

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[241] The *Polydor Case, op. cit.*, p. 349, ground 18.

[242] The *Kziber Case, op. cit.*, p. I-225, ground 16. The same in the *Sevince Case, op. cit.*, p. I-3502, ground 16.

[243] The *Demirel Case, op. cit.*, p. 3753, ground 24.

being clear, precise and not subject in its implementation or effects to the adoption of any subsequent measure. For this purpose, the ECJ analyzed, in the first place, the terms of the provision in question. More particularly, the ECJ stated that unconditional character of the prohibition of discrimination based on nationality cannot be affected by the other paragraphs of the same Article not by the decisions of the Cooperation Council[244]. In very explicit manner, the ECJ stated that the fact that the Agreement did to envisage an association nor accession to the Communities "is not such as to prevent certain of its provisions from being directly applicable"[245].

The general requirements are not identical to those for the direct effect of the Community law *stricto sensu*. The same list of requirements function differently in the other context and the results of interpretation are necessarily different. Clarity of a provision depends basically on the purpose and objectives of the agreement, and it is in this context that the provision could be interpreted in a clear way. Legal technique in its wording is only an additional element. Also, unconditional character could be affected by the safety clauses, and not objective limits as in the Community law *stricto sensu*. Finally, further measures could depend on a decision of the body created for the implementation of the agreement, which is only in part an institution of the Community and, as its decisions depend on *consensus* of contracting parties, they are in principle different from the powers conferred by the EEC Treaty.

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[244] According the pertinent interpretation of the ECJ, this organ could be considered as the Community institution.

[245] The *Kziber Case, op. cit.*, p. I-226, ground 21.

6. SOME CONCLUSIVE REMARKS

The direct effect concept, giving to the national courts role of protectors, and to the individuals role of guardians of the Community legal order, has become a part of the legal culture of Member States[246]. This pattern was of crucial importance to further integration within the European Communities, and in fact, the ECJ has appeared to be one of the principal authors of this integration. The ECJ created, within the Community law *stricto sensu*, *inter alia*, by the concept of direct effect of Community provisions, the Community base on the rule of law, a coherent system that functions sometimes as autonomous and even as contrary to the political consideration characteristic for the other Community institutions.

The level of development of this concept in the Community on one hand, and the number and growing importance of the international agreements for the Community, on the other, inevitably put on the agenda of the ECJ the question whether the concept of direct effect could be implemented on the international commitments of the Community. The case-law of the ECJ on this issue has been subject to different conclusions. Thus, Bourgeois concludes that the Court "has transposed its doctrine of the direct effect of Community law to the quite different setting of the law of international agreements'[247]. Basically the same conclusion on the method of interpretation, with some reservations, is expressed by Manin in concluding that "*[C]elle-ci a en effet toujours été fondée sur l'intérpretation de l'accord en cause. Ce faisant, la*

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[246] Deidre Curtin, *op.cit.*, *supra* note 22, p. 34.

[247] Bougeois, op. cit., supra note , p. 1272.

Cour a été fidèle à la méthode d'intérpretation qu'elle a utilisée à propos des traités communautaires eux mêmes et qu'elle a transposée aux accords conclus par les Communautés"[248].

Although it may seem, at the first impression, that the ECJ has simply extended its theory of the direct effect from the internal to the external aspect of the Community law, this conclusion would be too superficial.

The ECJ indicated in several rulings that the direct effect concept could be developed in the rather specific context of the European Communities. In this legal system the ECJ has its well-defined role and competence. As a consequence, the ECJ has explored to the maximum extent the possibility to interpret creatively a combination of Article 177 and 189 of the EEC Treaty, in order to implement effectively its idea of the direct effect. While the ECJ has been charged, as an institution of the Community, to interpret legal acts of other institutions whose power was defined in the same Treaty, in the interpretation of international agreements, the ECJ has been faced with a different situation. This type of legal acts is based on *consensus* of the contracting parties and belongs to the legal system much less developed than that of the Community. Furthermore, this system of law is based on other principles governing its implementation (for example, reciprocity and not solidarity).

The ECJ has the possibility, as the interpreter of the Community

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[248] Philippe Manin, "L'article 228, paragraphe 2 du Traité C.E.E." in *Etudes de droit des Communautés européennes, Mélanges offerts à Pierre-Henri Teitgen*, (Paris:Pedone, 1984), p. 289 at 295.

law, to develop the notion of direct effect gradually, adapting it to the needs of the Common Market and its effective implementation. The case-law represents a mosaic of judgments which all together create a complete system of law. After the first important step undertaken by the *Van Gend & Loos Case* for the EEC Treaty, and confirmation of the effects of regulations, the ECJ has extended similar arguments for the direct effect of decisions and directives, although with still limited effects (horizonal direct effects of directives), but always guided by the imperative of the effectiveness of the Community law and having grounds in the wording of the EEC Treaty. This is probably the reason that the ECJ stated in the *Polydor Case* that "[t]he scope of that case-law must be indeed determined in the light of the Community's objectives and activities as defined by Articles 2 and 3 of the EEC Treaty"[249]. The first difficult phases in the establishment of such a system could thus, from today's perspective, be considered as history. But, even if at the present stage the analysis of the direct effect is limited mostly to the specific provisions, it always supposes the existence of already well-established concept.

The interpretation of international agreements gives much less possibility for a similar approach. The ECJ noted that even its interpretative role could be conditioned by the expression of the intentions of the contracting parties. Furthermore, the case-law cannot be automatically transposed to the international agreements as a fixed category of legal acts, due to the fact that each agreement has its own objectives and purposes. The process that lasted in the Community over the decades, has to start from the very beginning with each international agreement.

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[249] The *Polydor Case*, *op. cit.*, p. 348, ground 16.

Nevertheless, due to the importance of international agreements for the Community and probably reflecting the achievements of its own theory on the internal level, the ECJ, once in a situation to interpret agreements, tried to introduce as much as possible, elements of its considerations applied within the Community law *stricto sensu*.

Following its logic used in the *Van Gend & Loos Case*, the ECJ analyzes first the objectives and the purpose of the agreement in question. But while, in the Community, it was done in one judgment, the ECJ has to take inevitably different considerations into account dealing with several international agreements. Conclusions that may be drawn from its jurisprudence are highly uncertain. While refusing the direct effect of GATT provisions, the ECJ has not adopted the same approach even to different association agreements. To prove that even the intensity of links is not decisive for the direct effect, the ECJ ruled in favour of the direct effect of a free-trade agreement in the *Kupferberg Case*. This case-law cannot give any clear indication on the relevance of the legal nature of agreement, or intensity of links that it establishes with the Community, as relevant for the direct effect. If in the Community law stricto sensu there is a category of legal acts which automatically have the direct effect (regulations), dealing with international agreements, the ECJ is not ready to establish a similar principle for certain types of international agreements, according to their legal nature.

Furthermore, the association agreements, by their very nature, suppose more developed institutional structure than, for example, the free-trade agreements. While sometimes insisting on this element, in other cases the ECJ decides to ignore it.

Although at least elements for the direct effect of specific provision seem to be the same as within the Community internal system, these criteria are far from being decisive for the direct effect. Those general requirements are basically related to the self-sufficiency of legal norms, and in fact, depend on the objectives and the purpose of the legal acts in which the provision finds itself. Clarity of provisions of agreements cannot be based on the previous case-law of the ECJ and cannot follow the global development of the Community law. Also, the requirement of unconditional character could depend on the result of political negotiations and the existence of safety-clauses, and not on objective facts of the time-limit or additional measures.
In this regard, the ECJ seems more ready to accept the direct effect of principles (for example non-discrimination), than specific provisions.

The ECJ has never clarified the impact of the "mixed agreements" procedure for its interpretation. Only by stating that every agreement concerns the Community and thus has to be interpreted by the European Court, the ECJ has never explained what could be an interpretation of the other field covered by the agreement and the possible effect of different interpretation on the subjects of the Community law. A similar situation is with the horizonal direct effect. The category that has been carefully developed with the Community law *stricto sensu*, seems even not to deserve a simple reference in the ECJ's considerations of the international agreements.

On the other hand, the method of the ECJ's interpretation of international agreements cannot be either considered as any other

interpretation of international jurisdiction. The ECJ tries to objectivize, to the extent possible, the intention of contracting parties. Or, at least, to analyze it according to its own methodology. It is done without referring to, and sometimes even to the contrary of the intentions of the institutions which had negotiated and concluded the agreements on behalf of the Community or the Member States. In this regard, the interpretative methods of the ECJ differ from those of ordinary international jurisdictions. This fact is emphasized by the ECJ's careful dealing with the request for reciprocity of agreements. For the time being, the ECJ has made it clear that it is not ready to accept this argument to the extent of its use in international law, although the Member States and the Community institutions invoke this argument very often.

It could be stated that the ECJ has gone much further in establishing the direct effect of the provisions of general international law which are part of the international agreements of the Community, but that its arguments and the results of its consideration are more modest when compared with the Community law *stricto sensu*. It can be argued also that political considerations are more present in deliberations on the direct effect of international agreements than those for the Community law *stricto sensu*. Sometimes, the ECJ even does not apply the same criteria to the different types of international agreements, presenting more severe arguments in cases of denial than recognition of the direct effect.

It would be to optimistic to expect the ECJ to simply extend its concept of the direct effect to a different system of law. Nevertheless, its jurisprudence shows the tendencies of the ECJ

to, if not transpose automatically, at least introduce to the extent possible, the elements of its theory applied to the Community law *stricto sensu* to the interpretation of the effects of international agreements within the Community law.

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